BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

	)	
In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	RM - 11293
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM - 11303
	)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TELECOM COUNCIL

EDISON ELECTRIC INSTITUTE

Edward Comer, Vice President & General Counsel
Aryeh Fishman, Director, Regulatory Legal Affairs
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-5615

UTILITIES TELECOM COUNCIL

Jill M. Lyon, Vice President & General Counsel
Brett Kilbourne, Director of Regulatory
Service & Associate Counsel
1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
(202) 872-0030

April 22, 2008

TABLE OF CONTENTS

INTRODUCTION 4

EXECUTIVE SUMMARY.. 5

COMMENTS 8

I. THE CABLE INDUSTRY'S PUBLIC STATEMENTS DEMONSTRATE THAT DEVELOPMENTS SINCE THE ENACTMENT OF THE 1996 ACT WARRANT MAJOR REFORMS OF THE COMMISSION'S POLE ATTACHMENT RULES. 8

A. THE CABLE INDUSTRY HAS QUICKLY MATURED INTO A MAJOR PROVIDER OF TELECOMMUNICATIONS SERVICES THAT NO LONGER QUALIFIES FOR A CABLE-ONLY RATE ……………………………………………………………………………………..10

B. THE PRESUMPTION OF FIVE ATTACHERS PER POLE RESULTS IN SUBSTANTIAL UNDERPAYMENT FOR POLE COSTS BY TELECOMMUNICATIONS PROVIDERS. 13

C. ELECTRIC UTILITIES HAVE NOT BECOME SIGNIFICANT PARTICIPANTS IN BROADBAND MARKETS. 15

D. THE RELIABILITY OF THE ELECTRIC AND TELECOMMUNICATIONS INFRASTRUCTURE HAS BECOME INCREASINGLY IMPORTANT OVER THE PAST DECADE. 16

E. UNAUTHORIZED AND UNSAFE ATTACHMENTS HAVE BECOME A PERVASIVE PROBLEM, DISTORTING COMPETITION FOR BROADBAND SERVICES AND THREATENING WORKER SAFETY AND CRITICAL INFRASTRUCTURE RELIABILITY. 19

II. THE CABLE RATE RESULTS IN UNJUSTIFIED SUBSIDIES FOR THE CABLE INDUSTRY AT THE EXPENSE OF ELECTRIC CONSUMERS. 20

A. THE CABLE RATE DOES NOT OVERCOMPENSATE UTILITIES. 22

B. THE COMMISSION SHOULD RECOGNIZE THAT, AS A MATTER OF LAW, THE CABLE RATE RESULTS IN SUBSIDIES FOR CABLE ATTACHERS AT THE EXPENSE OF ELECTRIC CONSUMERS. 27

C. THE TWO-TIER RATE SYSTEM BASED ON THE NATURE OF SERVICE PROVIDED OVER CABLE HAS BEEN UNENFORCEABLE. 35

III. THE COMMISSION SHOULD APPLY THE STATUTORY TELECOM RATE TO ALL JURISDICTIONAL ATTACHMENTS USING PRESUMPTIONS THAT MORE ACCURATELY REFLECT EXPERIENCE. 37

A. A UNIFIED RATE APPLICABLE TO ALL BROADBAND ATTACHERS CANNOT BE LOWER THAN THE TELECOM RATE. 37

B. THE COMMISSION SHOULD IMPROVE THE IMPLEMENTATION OF THE TELECOM RATE TO FURTHER REDUCE COMPETITION-DISTORTING SUBSIDIES. 46

IV. WIRELESS ATTACHMENTS PRESENT NEW CHALLENGES THAT SHOULD NOT BE SOLVED BY UNIFORM, NATIONAL SOLUTIONS. 47

A. THE COMMISSION SHOULD NOT PREEMPT STATE AND LOCAL JURISDICTION. 50

B. THE COMMISSION MAY NOT REQUIRE UTILITIES TO EXPAND CAPACITY. 53

C. THE COMMISSION SHOULD REJECT PROPOSALS TO MANDATE UTILITY REPORTING REQUIREMENTS AND ADOPT ACCELERATED DOCKET RULES. 54

D. THE COMMISSION SHOULD NOT PRESCRIBE UNIFORM, NATIONAL TECHNICAL STANDARDS FOR WIRELESS ATTACHMENTS. 56

E. THE COMMISSION SHOULD NOT PRESCRIBE STANDARD RATES FOR WIRELESS ATTACHMENTS BECAUSE THERE ARE SO MANY VARYING TYPES OF ATTACHMENTS. 63

V. THE COMMISSION SHOULD REFORM ITS REGULATIONS TO DETER ABUSIVE PRACTICES THAT THREATEN SAFETY, RELIABILITY AND COMPETITION. 65

A. THE COMMISSION SHOULD REJECT ARGUMENTS SEEKING TO DIMINISH THE IMPACT OF UNSAFE POLE ATTACHMENT PRACTICES BY TELECOMMUNICATIONS SERVICE PROVIDERS ON THE ELECTRIC SYSTEM. 66

B. DETERRENCE OF UNAUTHORIZED AND UNSAFE ATTACHMENTS HELPS, NOT HINDERS, BROADBAND COMPETITION. 70

C. THE COMMISSION'S REGULATORY APPROACH MUST BE REVISED TO STRONGLY DETER UNAUTHORIZED AND UNSAFE ATTACHMENT PRACTICES. 71

VI. ILECS HAVE NO POLE ATTACHMENT RIGHTS UNDER SECTION 224. 73

VII. CONCLUSION 74

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

	)	
In the Matter of	)	WC Docket No. 07-245
	)	
Implementation of Section 224 of the Act;	)	RM - 11293
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM - 11303
	)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TELECOM COUNCIL

Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the Edison Electric Institute ("EEI"), on behalf of its member companies, and the Utilities Telecom Council ("UTC") hereby submit these Reply Comments to address the questions and issues raised in the Commission's October 31, 2007 Notice of Proposed Rulemaking ("NPRM") regarding the amendment of the Commission's rules and policies governing pole attachments.

INTRODUCTION

EEI and UTC strongly urge the Commission to move forward with its proposal to modify its pole attachment regulations to reflect the substantial changes in cable and broadband communications markets that have taken place since the enactment of the 1996 Telecommunications Act (the "1996 Act"). EEI and UTC also urge the Commission to reject comments filed by the cable industry and other participants in this proceeding, as lacking substantial evidence and contrary to applicable law.

EXECUTIVE SUMMARY

The hugely successful growth and expansion of the cable and telecommunications industry since the enactment of the 1996 Act requires revising the Commission's pole attachment regulations to (1) provide a unified broadband rate that is not lower than the telecommunications rate ("Telecom Rate"), and (2) establish effective deterrence of unsafe and unauthorized attachments.

Since cable providers have developed into providers of multiple telecommunications services and no longer merely provide cable television services, there is no longer any justification for the cable-only rate. The 1996 Act and its legislative history show that the Cable Rate was intended to only provide a subsidy for the cable industry in its infancy until it matured into an industry providing a full array of broadband services. That has been accomplished, and therefore all jurisdictional attachers, including cable attachers, should pay a single rate based on the Telecom Rate formula.

The application of the Telecom Rate formula must also be reformed to reflect the realities of telecommunications industry trends in the past decade. The most important of these reforms is to recognize that the presumption there would be five attachers per pole has proven to be wrong. The reality is there is an average of fewer than three attachers (including the utility) per pole in both rural and urban areas. Each attacher should pay its full and fair share of the costs of the common space on the pole.

The Commission should also reject other criticisms of the Telecom Rate. The fact that the Cable Rate may have been at the lower end of the range of reasonableness because Congress wanted to subsidize an emerging industry does not in any way invalidate the Telecom Rate as being "overcompensatory." The Telecom Rate formula uses the kind of average cost pricing that is widely recognized as appropriate for fully regulated businesses like the electric distribution facilities that are involved here. Claims for use of marginal cost pricing should be rejected as inconsistent with basic regulatory economic and legal principles. Additionally, make-ready charges are separate costs from pole attachment rates and do not result in over compensation for electric utilities.

It is time to put to bed the claim that electric utilities have an interest to limit competition in broadband markets. While electric companies have tested some broadband applications in pilot projects, over the last decade electric utilities have not become “competitors” in broadband markets in any meaningful sense.

It is time to assure that attachment procedures and processes are complied with. The record demonstrates that violations are widespread. Since violators only have to make a utility whole if caught, there is no economic or other incentive to promote compliance. Attachers who provide no notice have the ultimate subsidy – they pay nothing unless caught.

Unauthorized and unmanaged attachments can create serious safety and reliability hazards to essential elements of this Nation’s critical infrastructure. Communications attachment rules are designed to assure the safety of communications workers who are not trained to work near electricity. Furthermore, attachments must not threaten the continued reliability or operation of the electric system. Unfortunately, unauthorized attachments have become pervasive and threaten worker safety and critical infrastructure reliability while also distorting competition between broadband service providers.

As a result of events during the past decade, including Congressional passage of specific legislation regarding electric system reliability and protection of critical infrastructure, electric utilities have an even higher interest in safety, reliability and fair cost allocation of costs related to their pole infrastructure. While the Commission should not become the arbitrator of safety and reliability decisions related to pole attachments, its regulatory framework should nonetheless complement and encourage compliance with programs that are implemented by states and utilities. We urge the Commission to clarify its notice requirements and to allow utilities to impose contractual penalties sufficient to deter unauthorized and unsafe attachments.

Wireless attachments present new challenges because of their diversity and unique regional and local characteristics, such as weather. The Commission should not preempt state and local jurisdiction or require utilities to expand their capacity in order to accommodate wireless attachments. These attachments should not be addressed by uniform national technical standards. Rather, the National Electric Safety Code ("NESC") can be used as a framework within state and local law for case-by-case decisions on what is necessary for wireless attachments in a particular region or locality. The NESC was not designed as and should not serve as a design specification for wireless attachments.

Similarly, due to the fact that wireless attachments are unique and involve different cost compared to wireline attachments, the Commission should allow rates to account for these variables on a case-by-case basis, subject to review. Finally, with respect to wireless attachments, the Commission should reject requests to impose various reporting requirements on utilities since this would not expedite negotiations of agreements and the deployment of facilities and is not cost-effective. If any reporting requirements are required, they should be imposed on attachers in order to help verify they have complied with needed notice and safety requirements.

Finally, EEI and UTC submit that the Commission must recognize that the plain reading of section 224(a)(5) is not subject to being characterized as a "purported" exclusion of ILECs from the definition of "telecommunications carrier." The Commission should reject claims that the statute is ambiguous, since this exclusion is explicit on the face of the statute.

COMMENTS

I. THE CABLE INDUSTRY'S PUBLIC STATEMENTS DEMONSTRATE THAT DEVELOPMENTS SINCE THE ENACTMENT OF THE 1996 ACT WARRANT MAJOR REFORMS OF THE COMMISSION'S POLE ATTACHMENT RULES.

Despite their pleas for continued subsidies and competitive advantages, the cable and telecommunications industries confirm that there are compelling reasons for the Commission to go forward with reforming its pole attachment regulations by providing for a unified broadband rate that is higher than the Cable Rate and effective deterrence of unsafe and unauthorized attachments. The Commission should reject the National Cable & Telecommunications Association's ("NCTA's") assertion that "nothing has changed" since the Commission's last pole attachment rulemaking to warrant reform.[1] To the contrary, its latest advertisement, "Cable Broadband in the Blink of an Eye"[2] (see Figure 1), portrays quite a different message from cable industry filings submitted in this proceeding claiming that the cable industry still needs the Cable Rate to be competitive.

[1] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of the National Cable and Telecommunications Association at 6 (filed March 7, 2008) ("NCTA Comments").

[2] Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11.

Figure 1.


THE WASHINGTON POST
TUESDAY, APRIL 15, 2008 A11
Cable. Broadband in the blink of an eye.
Cable rapidly built the fastest national broadband network in America reaching more than 90% of all households, delivering high-speed Internet, hi-def video and now … in a blink … digital phone service.
Blink.
More Competition.
Cable invested more than $100 billion, creating competition for high-speed Internet services and providing a national platform for innovative and competitive Internet technologies.
More Choice.
Cable's lightning fast broadband network gives consumers – for the first time – real choice in phone service.
More Savings.
Over 15 million Americans have switched to cable's phone service. Consumers and small businesses are projected to save $100 billion over the next five years.*
More Satisfaction.
In 2007, J.D. Power and Associates** ranked cable companies #1 in customer satisfaction in the delivery of phone service, in ALL SIX regions of the U.S.
cable
Cable competes. Consumers win.
Copyright 2008 National Cable & Telecommunications Association
*Study by Microeconomic Consulting & Research Associates, Inc.
**J.D. Power and Associates is a registered trademark and neither sponsored nor approved this ad.

A. THE CABLE INDUSTRY HAS QUICKLY MATURED INTO A MAJOR PROVIDER OF TELECOMMUNICATIONS SERVICES THAT NO LONGER QUALIFIES FOR A CABLE-ONLY RATE.

The NCTA claims that nothing has changed, yet it admits "much has changed in the retail marketplace."[3] The NCTA and other cable industry commenters acknowledge the cable industry has matured into a major, full-fledged participant in markets for broadband telecommunications services, including video, internet, and telephone services.[4] The NCTA's advertisement boasts that "[c]able rapidly built the fastest national broadband network in America reaching more than 90% of all households, delivering high-speed internet, hi-def video and now . . . in a blink . . . digital phone service."[5] "Cable competes," as the NCTA affirms, and, therefore, no longer needs a subsidized rate.

Indeed, the Commission should recognize that the NCTA itself reflects the cable industry's transformation. For example, in 2001 the NCTA was called the "National Cable *Television* Association," but then decided to change its name to the "National Cable &

---

[3] NCTA Comments at 7.

[4] For example, Time Warner Cable stated in its 2006 annual report that "[i]n our basic video product, the most mature of our offerings, we added more than three times the number of net subscribers we added in the preceding year. Residential high-speed data net additions increased 20 percent. This acceleration is remarkable for a product that just reached its 10th anniversary. In addition, Digital Phone has had its best year ever! These power subscriber trends led directly to robust financial results. In our legacy systems, we increased revenues by $1.3 billion, or 15 percent, in 2006 - our highest full-year revenue growth rate in four years. As of December 31, 2006, Digital Phone had been launched in all of the Legacy Systems and was available to nearly 94% of the homes passed in those systems." Time Warner Cable, *Annual Report 2006* at CEO's Message page 2 (April 2007) *at* http://ir.timewarnercable.com/common/download/download.cfm?companyid=TWC&fileid=91246&filekey=632C4D0F-B607-4F10-BAEC-8D18E437C2EE&filename=TWC2006AR.pdf.

[5] Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11.

Telecommunications Association" (emphasis added).[6] It is particularly illustrative that the president and CEO of the NCTA stated that the "new name better reflects the industry's changing landscape" since broadband has allowed the cable industry to provide "entertainment, information and telecommunications services."[7]

It is also illustrative that the cable industry itself has reported remarkable success in offering both high-speed internet and telephone services to its customers in the United States. The NCTA reports having invested $100 billion to create a "national platform for innovative and competitive internet technologies."[8] Specifically, the NCTA states, advanced networks have allowed "cable operators . . . to offer high-capacity broadband Internet access to over 92 percent of the country."[9] In its 2007 Industry Overview, the NCTA reported that "119 million homes were passed by cable's high-speed internet service in 2006, which represent 94 percent of all U.S. homes."[10] Further, the cable industry has experienced considerable success with its phone service offerings. The NCTA's 2007 Industry Overview notes that residential phone service is "[t]he newest competitive battleground," reporting that over three million households switched to cable telephone service in 2006, and the industry wide total is 9.5 million, which represents a more than 47 percent annual growth rate over the past three years.[11] Just this month, the cable

---

[6] NCTA, *NCTA Changes its name to National Cable & Telecommunications Association* (April 30, 2001) *available at* http://www.ncta.com/ReleaseType/MediaRelease/131.aspx.

[7] *Id*.

[8] Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11

[9] NCTA Comments at Summary.

[10] NCTA, *2007 Industry Overview* at 11 (April 24, 2007) *available at* http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_04.24.07.pdf

[11] *Id.* at 17.

industry reported “over 25 million Americans have switched to cable’s phone service.”[12] Both Comcast and Time Warner Cable, Inc. (“Time Warner Cable”) report successful internet and telephone service offerings. Comcast reports that it had 13.2 million high-speed internet customers and 4.6 million voice customers as of December 31, 2007.[13] Time Warner Cable indicates that it is the U.S.’s second-largest cable operator, describes itself as “an industry leader in developing and launching innovative video, data and voice services”[14] and reports that increased subscriptions to internet and phone services have directly led to “robust financial results.”[15]

The Commission simply cannot ignore the cable industry’s own boasting of its role as a major telecommunications provider. Its success and financial strength[16] remove any doubt that the industry is neither fledgling nor solely dedicated to cable (as opposed to broadband services). As a result, there simply is no reason for the Commission to continue to offer a cable-only rate.

---

[12] Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11; *see* Figure 1.

[13] Comcast, *Corporate Overview* (2007) *available at* http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html.

[14] Time Warner Cable, *About Us: Industry Leader* (April 1, 2008) *available at* http://www.timewarnercable.com/Corporate/AboutUs/.

[15] Time Warner Cable, *Annual Report 2006* at CEO’s Message p. 2 (April 2007) *available at* http://ir.timewarnercable.com/common/download/download.cfm?companyid=TWC&fileid=91246&filekey=632C4D0F-B607-4F10-BAEC-8D18E437C2EE&filename=TWC2006AR.pdf.

[16] NCTA indicates cable invested more than $100 billion in infrastructure. Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11.

B. THE PRESUMPTION OF FIVE ATTACHERS PER POLE RESULTS IN SUBSTANTIAL UNDERPAYMENT FOR POLE COSTS BY TELECOMMUNICATIONS PROVIDERS.

The State Cable Associations argue that the cable broadband providers should not be required to pay the Telecom Rate because Congress's expectation that the 1996 Act amendments would result in a greater number of attaching entities on the pole has not been fulfilled.[17] This argument is misleading and the Commission should reject it because, as explained above, Congress's expectation that the cable industry would become a fully mature industry has been fulfilled, and therefore the cable industry no longer needs the inherent subsidy of the Cable Rate.

Although the State Cable Associations are incorrect that the Telecom Rate should not apply to cable broadband attachments, their comments nevertheless confirm that the Commission's presumption of five attachers per pole in urban areas is too high: "[w]hen the 1996 amendments were passed, it was assumed—incorrectly—that there would be many separate attachers and attachments . . . . As it has turned out, additional services—whether VoIP or

---

[17] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of the Alabama Cable Telecommunications Association, the Broadband Cable Association of Pennsylvania, the Broadband Communications Association of Washington, the Cable Television Association of Georgia, the Cable Telecommunications Association of New York, Inc., the Cable Telecommunications Association of Maryland, Delaware & the District of Columbia, the Missouri Cable Telecommunications Association, the New England Cable and Telecommunications Association, Inc., the Oregon Cable Telecommunications Association, the South Carolina Cable Television Association, and the Texas Cable Association at 12-16 (filed March 7, 2008) ("State Cable Associations Comments").

circuit-switched—have not been provided over large numbers of new attachments on each pole, but over existing attachments."[18]

Under the Telecom Rate, each attaching entity is required to pay for its proportionate share of the cost of the usable space, plus an equal share of two-thirds of the cost of common space.[19] Thus, under the statute, the utility is required to pay for one-third of the cost of the common space, in addition to an equal share of the remaining two-thirds of the common space, which is divided equally among all parties on the pole. As described in EEI and UTC's initial comments, experience demonstrates that while the number, variety, and weight of attachments has increased overall, the number of "attaching *entities*" (excluding the utility) per pole has averaged fewer than two in both rural and urban areas.[20] As a result, utilities receive less than two-fifths of the presumed rate, and each communications attacher pays a smaller share than it would pay if the cost of common space were apportioned equally among all *actual* attaching entities. This difference represents a subsidy provided to attaching entities at the expense of electric consumers. Correcting this presumption to reflect electric utilities' actual experience of two telecommunications attachers per pole is essential to reflect industry experience over the past decade.

---

[18] State Cable Associations Comments at 16 (stating "[f]or example, cable operators offering VoIP do so over the same fiber facility that carries video cable services. There is no new line, no new attachment. . . .").

[19] 47 U.S.C. § 224(e)(2)(2006).

[20] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of American Electric Power Service Corporation, Duke Energy, Corporation, Entergy Services, Inc., PPL Electric Utilities Corporation, Progress Energy, Southern Company, and Xcel Energy Services Inc. at 3 (filed March 7, 2008) ("Electric Utilities Group Comments").

C. ELECTRIC UTILITIES HAVE NOT BECOME SIGNIFICANT PARTICIPANTS IN BROADBAND MARKETS.

Comcast wrongly claims that electric utility pole owners have abused their "monopoly control of poles to limit competition" and that electric utilities' purported "economic incentives to abuse monopoly power have grown as . . . electric utilities increasingly compete with cable and other attachers in providing voice, data, and video services."[21] The reality is that electric utilities are not "competitors" in broadband markets in any meaningful sense. According to the Commission's recent report on broadband deployment, as of June 2007 there were only 5,420 subscriber lines to "power line and other" technologies nationwide out of a total of 69,556,081 "advanced services lines."[22] In other words, power line broadband connections accounted for not more than a statistically insignificant 0.008% (i.e., less than one-hundredth of one percent) of all broadband connections.[23]

While a number of electric utilities have experimented with broadband networks within the past decade, this does not support Comcast's allegations. To the contrary, most of these networks have been used primarily for electric utility "smart grid" applications to enhance performance of electric utility operations, not to provide broadband communications services to

[21] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Comcast Corporation at iii (filed March 7, 2007) ("Comcast Comments").

[22] *See* FCC, *High-Speed Services for Internet Access: Status as of June 30, 2007* at Table 2 (March 2008) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf ("Other" is not defined).

[23] *See id*. In many of these cases, the electric provider in question is a municipal or cooperative utility, none of which are "utilities" for purposes of the 1996 Act. *See* 47 U.S.C. § 224(a)(1) (definition of utility excluding "any person who is cooperatively organized, or any person owned by . . . any State").

the public. There are a very small number of commercial deployments of broadband over power line ("BPL") technology across the country, almost all of which are on a pilot basis or otherwise limited in scale, typically serving a particular municipality, town, or neighborhood. Some electric utilities have evaluated the technical and commercial possibility of providing broadband service and have determined that such ventures would be incompatible with their core business of providing electric service. In general, electric utilities lack the expertise and administrative support needed to engage in the business of providing broadband services on a large-scale commercial basis.

Contrary to Comcast's claim, electric utilities are simply not in competition with broadband providers and therefore have no incentive whatsoever to "limit competition in broadband markets."[24] It cannot reasonably be disputed that the major competitors in broadband markets are cable systems, ILECs, and CLECs, *not* electric utilities.

D. THE RELIABILITY OF THE ELECTRIC AND TELECOMMUNICATIONS INFRASTRUCTURE HAS BECOME INCREASINGLY IMPORTANT OVER THE PAST DECADE.

The Commission should disregard comments that seek to diminish the seriousness of utilities' safety and reliability concerns.[25] These commenters fail to acknowledge the importance

---

[24] Conversely, broadband providers are not in the business of providing electric service and therefore are not in "competition" with electric utilities in electric markets.

[25] For example, Time Warner Cable conclusorily rejects "utilities' trumped-up charges that cable operators and other communications attachers recklessly create unsafe pole conditions" and falsely asserts that utility claims of unauthorized attachments are a byproduct of "sudden reversal of accepted attachment practices." *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Time Warner Cable, Inc. at iv (filed March 7, 2008) ("Time Warner Cable Comments").

of the nation's critical electric infrastructure and the fact that the nation's concerns about these issues, especially the reliability of critical infrastructure, have become more pronounced over the past decade.

The notice, safety, and reliability requirements imposed on attaching entities are needed to protect the public from electrical hazards and to ensure the reliability of the electric system on which all other networks, including telecommunications networks, depend. State utility commissions have for many years acted to ensure the safety and reliability of electric infrastructure by balancing the needs of the end-use customer with the needs of electric utilities, telephone utilities, and cable companies. However, in the wake of September 11, 2001, maintaining the security and integrity of critical infrastructure has become a national imperative. Department of Homeland Security programs have brought a higher level scrutiny to critical infrastructure access and maintenance matters.[26] In addition, in the Energy Policy Act of 2005, Congress enacted the strong federal goal of assuring electric transmission system reliability by approving a new enforceable electric reliability regime with oversight by the Federal Energy Regulatory Commission that includes mandatory and enforceable Reliability Standards for interstate transmission lines and related facilities.[27] It is also significant that under this framework, electric utilities may be subject to very significant financial penalties for violations of Reliability Standards, which may run up to one million dollars per day. These federal

[26] Department of Homeland Security, *Fact Sheet: National Infrastructure Protection Program Sector Specific Plans* (May 25, 2007) *available at* http://www.dhs.gov/xnews/gc_1179776352521.shtm (Energy Sector Specific Plan creates "a comprehensive risk management framework to establish national priorities, goals, and requirements to protect critical infrastructure and key resources…the SSPs together serve as a roadmap for how infrastructure sector stakeholders are implementing core security enhancements, communicating within their sectors and with governments to reduce risk, and iteratively strengthening security").

[27] 16 U.S.C.A. § 824o (2007).

activities and standards, in turn, have driven an increased level of scrutiny by utilities and state regulators of all levels of electric facilities, including distribution poles that host communications attachments. Moreover, states and utilities affected by recent natural disasters have also focused intensely on the security and adequacy of pole infrastructure[28] and the already high level of attention to assure compliance with reliability requirements has greatly increased even more across the electric utility industry.[29] While the Commission is not, and should not become, the arbitrator of safety and reliability decisions, its regulatory program should complement and incent compliance with such programs. EEI and UTC believe this is an area that the Commission may vastly improve by reforming its regulations in the manner recommended below.[30]

---

[28] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Florida Power & Light, Tampa Electric, and Progress Energy at 3-5 (filed March 7, 2008) ("Florida IOUs Comments"); *see also* Fla. Admin. Code, Rule 25-06.0342(2) (requiring utilities to submit storm hardening plans); Fla. Admin. Code, Rule 25-06.0342(5) (requiring utilities to keep as part of a storm hardening plan "written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by ot hers to the utility's electric transmission and distribution poles").

[29] *See, e.g.*, Federal Energy Regulatory Commission, *Commission finalizes Electric Reliability Rulemaking pursuant to the Energy Policy Act*, (February 2, 2006) *available at* http://www.ferc.gov/news/news-releases/2006/2006-1/02-02-06-E-1.asp; *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, 72 FR 16416 (Apr. 4, 2007), FERC Stats. and Regs. ¶ 31,242 (2007), *reh'g denied*, Order No. 693-A, 72 FR 40717 (July 25, 2007), 120 FERC ¶ 61,053 (2007) (adopting 83 mandatory reliability standards for users, owners, and operators of the electric bulk power system).

[30] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of the Edison Electric Institute and Utilities Telecom Council at 44-74 (filed March 7, 2008) ("EEI and UTC Comments").

E. UNAUTHORIZED AND UNSAFE ATTACHMENTS HAVE BECOME A PERVASIVE PROBLEM, DISTORTING COMPETITION FOR BROADBAND SERVICES AND THREATENING WORKER SAFETY AND CRITICAL INFRASTRUCTURE RELIABILITY.

Time Warner Cable flatly denies that "cable operators and other communications attachers recklessly create unsafe pole conditions and attach to their poles unlawfully" and falsely asserts that unauthorized attachments are "largely a byproduct of poor utility record keeping or utilities' sudden reversal of accepted attachment practices."[31] The Commission should reject these unsubstantiated conclusions. The Commission should also disregard Comcast's misleading warning that the Commission should not to be "swayed by claims that cable threatens the safety of pole infrastructure" and that "such claims have been found to be unsubstantiated."[32] The Commission should recognize that both Time Warner Cable and Comcast have admitted, in their own comments, that this is a problem for which they have significant responsibility. Time Warner Cable states that cable operators are not "responsible for *more than their share* of safety issues on utility poles."[33] Time Warner Cable does not specify precisely the cable industry's "share" of such responsibility, but it admits it has a part in this problem. Likewise, Comcast denies that "attachers are the chief source" of safety violations, which is also an admission that it does not have clean hands, but does not address the extent to which cable attachers are committing safety violations.[34]

---

[31] Time Warner Cable Comments at iv.

[32] Comcast Comments at vi.

[33] Time Warner Cable Comments at iv.

[34] Comcast Comments at Exhibit 3 at 1.

EEI and UTC have demonstrated in their initial comments that a substantial and growing percentage of all Commission-regulated communications attachments on electric poles are unauthorized, i.e., they have been made without notice to, or permission from, the utility.[35] Because the Commission's rules lack sufficient deterrence mechanisms, they have fostered and allowed a "catch-me-if-you-can" attitude among communications attachers. Telecommunications companies that do not comply with the rules receive a substantial economic and thus a competitive advantage over those that do comply. If caught, they simply have to make the attaching utility whole, but incur no economic or other deterrence penalty.

Moreover, unauthorized attachments are far more likely to raise safety and reliability problems because, without advance notice, the utility has no opportunity to perform an engineering study and make-ready needed to ensure safety and reliability. The Commission is therefore right to express concern about the "prevalence" of unauthorized attachments[36] and, as further explained below and in EEI and UTC's initial comments, should modify its regulatory approach to impose much greater penalties or other deterrence mechanisms on violators.

II. THE CABLE RATE RESULTS IN UNJUSTIFIED SUBSIDIES FOR THE CABLE INDUSTRY AT THE EXPENSE OF ELECTRIC CONSUMERS.

As shown in Part I above, the transformation of the cable industry into a full-blown telecommunications industry demonstrates that there is no reason for the Commission to maintain any cable rate at all. Even if a few cable-only providers still exist, they are likely to soon follow the rest of the industry into full broadband status. As the NCTA's advertisement

[35] EEI and UTC Comments at 25-33; *see also* Electric Utilities Group Comments at 9-18.

[36] NPRM at ¶ 38.

indicates, cable can provide broadband service in the "Blink of an Eye."[37] And utilities have no effective means of knowing when a change in service is implemented without direct notice from the provider. For these reasons, EEI and UTC submit that the record demonstrates there is no need for a cable-only rate.[38]

Cable commenters claim that the current Cable Rate is not a subsidy rate because it compensates the electric utility for more than its marginal cost of accommodating the pole attachment. Morover, cable commenters argue, the Cable Rate over compensates electric utilities.[39] The Commission should reject these claim as a matter of economics, law, and sound public policy. The cable rate does not over compensate utilities because marginal cost is not the proper measure of what constitutes full and fair cost allocation. The Commission should recognize that the Cable Rate, which was originally enacted by Congress to support an "infant

---

[37] Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11; *see* Figure 1, *supra.*

[38] If the Commission determines a reason to allow for a cable-only rate for true cable providers, it must apply such a rate *only* to such cable companies when they provide legally binding filings to such effect, are required to update such filings at least once a year, and are subject to substantial fines and penalties for non-compliance and erroneous submissions.

[39] For example, Time Warner Cable states that "[t]he Cable Rate allows utilities to recover their fully allocated costs of providing pole attachments, and thus in no way contains any subsidy for cable operators." Time Warner Cable Comments at ii. Comcast refers to "the Commission's subsidy misconception." Comcast Comments at 13. The State Cable Associations state that "the Commission in this NPRM suggests that the current cable rate formula is a subsidy because it does not factor in unusable space at all. This is flat-out wrong. The Commission previously explained that the cable rate includes the costs of the unusable pole space." State Cable Associations Comments at 12. NCTA does not answer the Commission's question of "whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers." NPRM at ¶ 19. Instead, NCTA simply rejects the Commission's question, asserting that it "demonstrates a complete lack of understanding of the history and purpose of Section 224 of the Act and the Commission's rules implementing that section." NCTA Comments at 8. On the contrary, EEI and UTC believe the Commission is absolutely correct to seek comment on the extent to which the Cable Rate subsidizes the cable industry at the expense of electric consumers and whether the cable industry should continue to receive such a subsidy.

industry" in fact still provides a subsidy because it does not provide for a full and fair allocation of the costs of the common (i.e., "other than usable") space on the pole, including the communication worker safety space. Furthermore, unauthorized and unsafe attachments have resulted in additional, implicit subsidies that cable operators enjoy at the expense of electric consumers, the public, and the cable companies' own competitors. Eliminating all of these subsidies will not inhibit broadband competition. On the contrary, a uniform, full-cost-allocation rate formula and uniform compliance with applicable safety rules will enhance competition by ensuring that all market participants are uniformly paying for the true costs of pole access.

A. THE CABLE RATE DOES NOT OVERCOMPENSATE UTILITIES.

Comcast argues that the current Cable Rate over compensates utilities because it requires the cable attacher to pay for a portion of the average cost of the pole in addition to the marginal costs of a pole attachment. Comcast argues, moreover, that the "proper regulatory rate" for pole attachments is the marginal cost alone and that utilities are already compensated through make-ready charges.[40] These arguments misconstrue the economics of pole attachment infrastructure and maintenance.

1. Marginal cost alone does not reflect a full and fair allocation of pole costs.

Commenters claim that marginal cost should be the measure of just and reasonable rates.[41] The Commission should reject this claim because it ignores the fundamental principle of utility cost-of-service regulation, which is that a regulated utility is entitled to set rates to recover

[40] Comcast Comments at 4; *see also,* NCTA Comments at 12-19.

[41] *See, e.g.,* Comcast Comments at 13.

all operating expenses, including depreciation, plus a fair rate of return on the value of the asset.[42] Thus, it is inconsistent with this concept to mandate any of a utility's regulated assets or services to be subject to marginal cost pricing or any price mechanism that does not allow full cost recovery (unless there is a higher compensating cost recovery in some other sector of the business), whether this be the use of a pole, the leasing of building space, or the operation of a piece of machinery. Providing certain users with a lower price to use regulated assets or services in order to subsidize them would be equivalent in concept to a regulated utility providing a lower electric rate to certain classes of customers based on marginal cost rather than average cost. The fact that these are "new customers" using existing assets does not change the argument—if all "new" customers were put on a marginal cost rate, then a utility would not be recovering its average cost of service as new assets are eventually added to supplement or replace the existing ones.

Using the logic above, a regulated utility would face the risk of being compelled to offer services at non-compensatory rates to any class of business customers identified as being in a fledgling industry that would benefit from a subsidy. Should this then apply to any new business or company? A company that has changed ownership? A first-time home-buyer? It is a slippery slope from pricing for the use of some assets at less than average cost to help a fledgling industry, to compromising a utility's ability to recover its cost of providing reasonable and reliable service as this concept is generalized.

[42] *See* Charles Phillips, Jr., *The Regulation of Public Utilities* (1993) at 176. "The basic standard of rate regulation is the revenue-requirement standard, often referred to as the rate base-rate of return standard. Simply stated, a regulated firm must be permitted to set rates that will both cover operating costs and provide and opportunity to earn a reasonable rate of return on the property devoted to the business." *Id*.

Comcast fails to explain why average cost is not a just and reasonable measure for pole rental rates. Contrary to Comcast's claim, the Commission should recognize that the poles and other transmission and distribution facilities to which attachments are made are fully rate-regulated businesses subject to traditional regulation averaging input costs. All of the cost inputs (poles, labor, etc.) are purchased at market prices subject to pervasive oversight by state and federal regulators. Pole attachment rates are a function of the electric utilities' actual costs, as recorded in each utility's FERC Form 1.[43] Each individual element of a utility's overall cost is the market cost of whatever product or service the utility needs to build, operate, and maintain its pole plant. The utility, like other businesses, generally pays market rates for labor, construction materials, professional services, and other items necessary to provide pole infrastructure. Although these expenditures are made for the most part in competitive markets, the transactions and related accounting are subject to substantial scrutiny in rate proceedings before state and federal regulators, who generally require that all costs must be "prudently incurred."[44] Even where elements of the rate (e.g., wholesale generation cost) are directly determined by the market, regulators have made a determination that the overall rate formula is just and reasonable.[45] Full cost allocation pricing for pole attachment access therefore does not in any way constitute an "abuse" of "monopoly control."

---

[43] *See* 47 C.F.R. §§ 1.404 (g)(2), (h)(2), (i), and (j) (2006) (requiring utilities to provide cable television operators or telecommunications carriers to data from ARMIS, FERC Form 1, or other reports filed with state or federal regulatory agencies).

[44] *See, e.g., Florida Power & Light Co.*, 98 FERC ¶ 61,260 at ¶ 8 (2002) ("The Commission allows public utilities to recover only prudently incurred costs").

[45] *See, e.g., Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697 at ¶ 943, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, clarified, 121 FERC ¶ 61,260 (2007) (stating that "the just and

It should also be emphasized that the capital component of average cost in pole rates is typically calculated in terms of average *historical* (i.e., embedded) cost, not the actual current replacement cost. As a result, pole attachment rates are substantially lower than they would be if attachers were required to pay a rate based on what their actual cost would be to build their own pole infrastructure. In theory, a stand-alone replacement cost would be a more accurate proxy for a market rate for pole access. If communications attachers did not have access to existing electric utility infrastructure paid for by electric consumers, such attachers would be required to build their own networks of poles. Even apart from the costs of securing additional rights-of-way, the costs of building such networks would be substantially higher than the costs of paying for the communications attachers' full and fair allocation of the utilities' historical cost.

Although EEI and UTC are not, in this proceeding, asking the Commission to use stand-alone replacement cost as a baseline, EEI and UTC strongly believe that using replacement cost as a baseline for determining pole attachment rates would better reflect the actual costs of providing broadband services in a competitive market. As Stephen Breyer (now Justice Breyer) has observed, "[a] competitive market values assets, not at their historical price, but at their *replacement* value—the present cost of obtaining identical service that the old asset provides."[46] Thus, relative to the cost communications attachers would have to bear to build their own pole networks, communications attachers are far better off paying a rate based on historical costs under the improved version of the Telecom Rate as recommended by EEI and UTC. In evaluating the extent to which the Cable Rate provides a subsidy to cable operators, and to place

reasonable standard does not compel the Commission to use any single pricing formula in general" *citing Mobil Oil Exploration v. United Distribution Co*., 498 U.S. 221, at 224 (1991)).

[46] Stephen Breyer, *Regulation and its Reform* (1982) at 38 (emphasis in original).

the entire discussion of pole attachment rates in perspective, EEI and UTC recommend that the Commission consider the substantial benefit cable operators would receive under an improved, historical-cost-based Telecom Rate methodology rather than a replacement cost methodology.

2. Make-ready charges are separate from pole attachment rates.

Comcast claims that the Cable Rate is more than compensatory because the cable industry pays all of the marginal costs of its attachments in the form of make-ready charges, and then must additionally pay a pole rental fee based on its proportionate share. This claim is irrelevant. It is well established that it is just and reasonable for a utility to charge both a non-recurring make-ready charge for its incremental costs and an annual pole rental fee based on a portion of average capital costs and on-going operation and maintenance costs.[47] Make-ready charges are non-recurring costs associated with preparing the pole infrastructure to accommodate the attachment. Such charges are not included in the pole attachment rate base for purposes of calculating the annual pole attachment rate. The utility is not overcompensated for the same costs because the make-ready costs are not included in the pole line capital account used in calculating the annual pole attachment rate.[48]

---

[47] *See In the Matter of Adoption of Rules for the Regulation of CATV Pole Attachments, CC Docket No. 78-144*, First Report and Order at ¶ 42 (Aug. 8, 1978) (stating with regard to make-ready costs that "a rate that is comprised of both incremental and fully allocated components is not per se unreasonable or unjust, provided it falls within the circumscription of Section 224(d)(1) and otherwise complies with our rules").

[48] *See, e.g., In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order at ¶ 27 (March 29, 2000) (stating that "[m]ake-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation").

B. THE COMMISSION SHOULD RECOGNIZE THAT, AS A MATTER OF LAW, THE CABLE RATE RESULTS IN SUBSIDIES FOR CABLE ATTACHERS AT THE EXPENSE OF ELECTRIC CONSUMERS.

As explained above, sound economics shows that the Cable Rate provides a subsidy at the expense of electric consumers and, therefore, does not over compensate the electric utility. In addition, as a matter of law, the Cable Rate provides a subsidy to cable operators which is no longer warranted. The legislative history and text of section 224 show that the Cable Rate was intended to provide a subsidy and that Congress expected the cable industry to mature to a point beyond which such subsidy rate would no longer be necessary. Moreover, the structure of the Cable Rate language in section 224 shows that the Cable rate does not fully and equitably allocate the entire pole cost because, Contrary to Comcast's claims, the space factor in the Cable Rate does not include common space.[49]

1. Congress intended the Cable Rate to be a subsidy rate for an infant industry only until it matured into a full telecommunications industry.

Comcast cites the 1996 Act and prior amendments to section 224 to support the claim that the Cable Rate is *not* a subsidy. The opposite is true. The legislative history and text of the 1996 Act shows both that Congress established the Cable Rate to subsidize a not-yet-mature industry and that Congress did not intend the Cable Rate to apply to a mature cable industry, i.e., a cable industry that has entered competitive markets for telecommunications services.

A House Committee report accompanying legislation that ultimately became the basis of the 1996 Act characterized the Cable Rate as providing "cable companies a more favorable rate for attachment than other telecommunications service providers," and made clear that "[t]he

[49] *See* Comcast Comments at 12-15.

beneficial rate to cable companies *was established to spur the growth of the cable industry, which in 1978 was in its infancy*."[50] Furthermore, the statute expressly provides for a transition to a higher rate for cable companies that enter competitive telecommunications markets. Sections 224(d)(3) and 224(e)(1) require a transition from the Cable Rate to the higher telecommunications rate for a cable system that provides "any telecommunications service."[51] This transition provision shows that Congress contemplated the convergence of services offered by the telecommunications industry, and intended that cable companies that mature into full-fledged providers of telecommunications services should pay a higher rate.

Accordingly, if the Commission wishes to apply a single pole attachment rate to the broadband industry, the Telecom Rate, which applies to providers of telecommunications services, is the appropriate rate.

The Commission should recognize that the Conference Report's explanation of the pole attachment language expressly indicates that Congress contemplated a shift towards cable system participation in telecommunications markets. Specifically, the Conference Report states that

> to the extent that a company seeks pole attachment for a wire used solely to provide cable television services . . . that cable company will continue to pay the rate authorized under current law . . . . If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula.[52]

---

[50] H. Rpt. 104-204, Committee on Commerce Report to Accompany H.R. 1555, the Communications Act of 1995 (July 24, 1995) (emphasis added) ("Conference Report").

[51] 47 U.S.C. §§ 224(d)(3), 224(e)(1).

[52] *Id.* at 206.

EEI and UTC submit that cable convergence is occurring. Although the Commission has previously exercised its discretion to apply the Cable Rate to cable systems that provide commingled cable television and internet services, the legislative history nevertheless shows that Congress expected an increase in rates for cable systems that participate more broadly in telecommunications markets. As explained above, the convergence of cable and other communications services that Congress anticipated has taken place.

2. The Cable Rate is a subsidy rate because the Cable Rate space factor does not provide for a full and fair cost allocation appropriate for a mature industry to pay.

Comcast and others attempt to obfuscate the fact that the cable rate was intended as a subsidy for an infant cable industry by claiming that the Cable Rate fully and fairly allocates the entire cost of the pole, including the cost of common space.[53] Comcast's argument is erroneous because the space factor provided for under the Cable Rate does not allocate a fair proportion of the cost of common space to cable operators, does not allocate any of the cost of the safety space (which exists for the benefit of communications attachers), and does not reflect the value to communications attachers of reliable, secure critical electric infrastructure.

a. The Cable Rate "space factor" does not include the common space.

It is not disputed that the Cable Rate provides for an allocation of the entire cost of the pole. The first relevant issue is whether the "space factor" used to determine how that entire cost is fairly and properly divided among the several attaching entities. The Cable Rate allocates the cost of the entire pole, but only on the basis of the percentage of usable space occupied. EEI and

[53] Comcast Comments at vi, 9; *see also* State Cable Associations Comments at 12.

UTC fully agree with the NPRM when it states that the current Cable Rate, "whose space factor does not include unusable space, results in a subsidized rate . . . ."[54] The Telecom Rate, by contrast, allocates the cost of usable space on the percentage of usable space occupied, but makes a separate allocation of the cost of common space (i.e., "other than usable space") on the basis of the number of attaching entities. Any unified broadband rate must likewise allocate the cost of the common space on the basis of the number of attaching entities.

Consistent with Congress's intent to subsidize only fledgling cable companies, the Cable Rate does not provide for a full and fair allocation of the costs of pole plant. As explained in the EEI and UTC initial comments, the Cable Rate divides the cost of the pole only on the basis of proportionate use, without taking into account the fact that each attacher has an equivalent need for the common space on the pole, including the underground portion of the pole and the 18 feet of clearance space. For example, consider a pole that has two attachers (not including the utility itself). If a cable attacher that pays the Cable Rate occupies only one foot of space on a 37.5 foot pole, such attacher pays for only 1/13.5 of the entire cost of the pole. That means the cable attacher pays for 1/13.5 of the cost of the "usable space" and 1/13.5 of the cost of the common space. Thus, instead of paying an equal share for the common space (i.e., one-third of the cost of the common space), the cable attacher only pays 1/13.5 of that cost. If, hypothetically, the cost of the common space were $75, that means the cost of an equal share would be $25, while the cost of the cable system's share (at the subsidized Cable Rate) would only be approximately $2.00. This "bargain price"—an 82% discount off of what would be the full cost allocation price under the Telecom Rate—is an extraordinary benefit the cable system enjoys at the expense of electric consumers.

[54] NPRM at ¶ 19.

b. Communications attachers should bear the primary responsibility for the costs of the communications worker safety space.

Comcast's claim that the Cable Rate fully and fairly allocates the entire cost of the pole is further undermined by the fact that the cost of the communications worker safety space is allocated entirely to the utility. Under the Commission's current regulations, the communications safety space is classified as "usable" space. However, under both the current Cable Rate and current Telecom Rate, *none* of the communication worker safety space cost is allocated to communication attachers. This allocation is patently unjust and unreasonable because, as explained in EEI and UTC's initial comments, the communications worker safety space (as its name indicates) exists exclusively, or at least primarily, for the benefit of communications workers.[55] Because jurisdictional attachers currently pay nothing for the benefit of this space, such attachers are enjoying yet another subsidy at the expense of electric consumers. To eliminate this unjust subsidy, the Commission should revise its rate formula to allocate the cost of such space either entirely to the communications attachers, or, at a minimum, to classify the safety space as common space for which each attaching entity is equally responsible.

c. The Cable Rate does not require attaching entities to pay their fair share of the costs of maintaining safe and reliable pole infrastructure.

The Cable Rate is a subsidy rate in part because it does not require attaching entities to pay a sufficient share of the costs of maintaining a safe and reliable network of critical pole

[55] As EEI and UTC's initial comments explain, the NESC makes clear that the safety space exists to accommodate communications attachments. EEI and UTC Comments at 85.

infrastructure. The Commission should reject Comcast's claim that these critical electric infrastructure facilities are merely analogous to "apartment buildings" or "condominiums."[56] As explained in EEI and UTC's initial comments, the reliability of electric networks and the physical integrity of pole infrastructure are the foundations for the reliability of all other networks in a modern economy, including communications networks.[57] It is in the interest of communications attachers to maintain a safe, reliable, and physically secure network of electric distribution poles, ducts, conduits, and rights-of-way. Accordingly, the rates charged for access to these facilities should reflect the fact that they are critical infrastructure for which all users have a shared responsibility.

To say that a utility pole is like an apartment building is like saying that every resident in the building must live on at least the tenth floor with no occupancy on the first nine floors. To maintain the safety and reliability of this critical infrastructure, it is necessary to provide for minimum clearance space between the ground and the communications wires attached to the pole. Every attaching party needs the clearance space and should be required to pay an equal share for the costs of such space. The Commission should, therefore, take into account the value of critical electric infrastructure in maintaining the safety and reliability of critical electric and telecommunications systems in determining the extent to which existing rates provide subsidies to communications attachers at the expense of electric consumers.

---

[56] Comcast Comments at 14.

[57] EEI and UTC Comments at 9-13.

3. The Commission should follow states that recognize that the Cable Rate does not adequately compensate utilities.

Commenters should reject comments that ignore the fact that many states and other jurisdictions have independently examined pole attachment rate issues and have determined that communications attachers should pay rates that reflect a more equitable allocation of the costs of unusable space. EEI and UTC strongly agree with the initial comments filed by Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid, and NSTAR, which make plain that several jurisdictions have rejected the Cable Rate. Specifically, Delaware, Maine, Indiana, and the City of Seattle, Washington, have adopted rate methodologies that require cable and telecommunications attachers to pay a higher percentage of the costs of common space.[58]

In addition, recently, the staff of the Arkansas Public Service Commission ("APSC") and the Louisiana Public Service Commission ("LPSC") have issued proposed rules that permit a larger allocation of pole space cost to attaching parties.[59] The APSC staff, citing "cost causation and benefits-received principles," is proposing a formula that allocates two-thirds of the cost of the unusable space among attaching entities and allocates the communications worker safety space to unusable space.[60] The proposed rule also creates a rebuttable presumption that there are

[58] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., Kansas City Power and Light, National Grid, and NSTAR at 25 (filed March 7, 2008).

[59] APSC General Staff's Petition, *Limited Comments and Proposed Pole Attachment Rules*, Docket No. 08-073-R (April 17, 2008) (Arkansas Proposal); *Proposed Pole Attachment Rates*, LPSC Docket No. R-26968 (March 6, 2008) (Louisiana Proposal).

[60] Arkansas Proposal at 10.

only three attaching parties on each pole that hosts third-party attachments. The LPSC staff is proposing to continue to use its pole attachment formula adopted in 1980, which recognizes that the pole costs associated with the communications worker safety space should be shared by all parties.[61]

4. Pole attachment revenues generally offset electric rates and are not a separate profit center for the benefit of shareholders.

Comcast mistakenly argues that the Cable Rate does not subsidize cable attachers at the expense of electric consumers because pole revenues benefit utility shareholders, not customers.[62] This claim shows a fundamental misunderstanding of utility ratemaking. Providing pole attachment access is not a separate profit center for utilities. Pole attachment revenues simply offset rates paid by consumers. Retail electricity rates for the use of distribution facilities (including poles, ducts, conduits, and rights of way) are generally determined on the basis of capital costs, operation and maintenance costs, and a return on equity. Retail rates are heavily regulated by state public utility commissions. Even in states that have adopted rate caps, rate freezes, or retail competition, a utility's costs and revenues are all taken into account in subsequent rate proceedings that affect how future rates are determined. Over time, therefore, pole attachment rates that do not provide for a full and fair cost allocation directly affect the cost basis underlying regulated rates. Accordingly, in determining the extent to which the Cable Rate provides a subsidy at the expense of electric consumers, EEI and UTC urge the Commission to acknowledge that the Cable Rate subsidy is borne entirely by electric ratepayers.

[61] *See* Louisiana Proposal.

[62] Comcast Comments at 16.

C. THE TWO-TIER RATE SYSTEM BASED ON THE NATURE OF SERVICE PROVIDED OVER CABLE HAS BEEN UNENFORCEABLE.

Time Warner Telecommunications, Inc., One Communications Corp., CompTel (collectively "TWTC") and NCTA misleadingly argue that the best way for the Commission to achieve regulatory parity is to apply the Cable Rate to all attachments used for broadband telecommunications services, including attachments by providers of telecommunications services who must now pay the Telecom Rate.[63] This proposal is flawed in two ways. First, as explained in the initial comments of EEI and UTC, it is generally impossible for an electric utility to determine with certainty when cable attachments in its service territory are used to provide broadband telecommunications services in addition to traditional cable service, unless the type of service offered using such attachments has been identified by the attaching entity. Moreover, the cable industry itself seems to claim that a change in service can virtually be made in the "Blink" of an eye with no external change to the cable.[64]

In view of the cable industry's ability to change the type of services offered without providing any transparency, it is not surprising that numerous electric utilities have experienced situations in which a cable system represents to the utility that the cable system does not use its pole attachments for anything other than cable service (and thus obtains access at the lower Cable Rate), but at the same time the cable operator heavily promotes (through television advertising, billboards, mailers, and other means) "triple play" bundled offerings of cable,

---

[63] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Time Warner Telecommunications, Inc, One Communications Corp. and Comptel at 5 (filed March 7, 2008) ("TWTC Comments"); NCTA Comments at 21.

[64] *See* Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11; s*ee also* Figure 1.

internet, and telephone service. The Commission should not stand by and allow a practice akin to "bait-and-switch" to be tolerated if it is to promote real competition for broadband services. Accordingly, any unified rate should presumptively apply to all jurisdictional pole attachments, not just attachments specifically identified by the attaching entity as being used for broadband signals.

Second, as explained below, this one-rate formula cannot be the Cable Rate, because the Commission cannot apply the Cable Rate to any provider of telecommunications services. The existence of a reduced rate formula for cable creates a strong incentive for a cable system not to disclose the nature of the service it provides to the pole owner. The problem of widespread violations of this notification rule would be completely avoided if there were only one rate formula for all Commission-jurisdictional attachers. Thus, the Commission should reject the commenters' flawed proposal and apply an improved version of the Telecom Rate to all jurisdictional attachments. This reform will best serve the Commission's goals in this proceeding.

III. THE COMMISSION SHOULD APPLY THE STATUTORY TELECOM RATE TO ALL JURISDICTIONAL ATTACHMENTS USING PRESUMPTIONS THAT MORE ACCURATELY REFLECT EXPERIENCE.

As explained above, there is no sound economic basis for applying the Cable Rate to all broadband attachments. As a matter of law, the Commission cannot apply the Cable Rate to all broadband attachers because it has no authority to apply a rate lower than the Telecom Rate to providers of telecommunications services. Accordingly, a unified rate for all broadband attachments cannot be lower than the statutory Telecom Rate. The Commission likewise cannot apply any rate based on marginal cost to providers of telecommunications services because the

Telecom Rate is not based on marginal cost. Furthermore, to eliminate subsidies at the expense of electric consumers, the Commission must modify the implementation of the Telecom Rate to more accurately reflect current experience and circumstances.

A. A UNIFIED RATE APPLICABLE TO ALL BROADBAND ATTACHERS CANNOT BE LOWER THAN THE TELECOM RATE.

1. The Commission cannot apply the Cable Rate, or any other formula that results in a rate lower that the Telecom Rate, to telecommunications carriers.

The NPRM tentatively concludes that a unified rate should apply to all broadband providers, regardless of the technology platform. However, several commenters wrongly argue that this unified rate can be based on the Cable Rate or another rate formula that would result in a rate lower than the Telecom Rate.[65] This is incorrect as a matter of law, because the Commission has no statutory authority to apply any rate lower than the Telecom Rate to all broadband providers, where one or more broadband providers are telecommunications carriers, because the Telecom Rate under section 224(e) applies to pole attachments by all telecommunications carriers regardless of whether such carriers provide broadband service. Consider a hypothetical example. A CLEC is a telecommunications carrier that provides telecommunications services. If there are 85 cable broadband providers and 15 CLEC broadband providers under the Commission's jurisdiction, and a CLEC is a telecommunications carrier that provides telecommunications services, then the rate that applies to those 15 CLECs must be the

[65] Comcast and TWTC argue that the unified rate should be the Cable Rate. AT&T argues for a similar rate. *See* Comments of Comcast at 7; TWTC Comments at 4; *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of AT&T (filed March 7, 2008) ("AT&T Comments").

Telecom Rate. Logically, then, if the rate formula that applies to the CLECs is a uniform rate that applies to all broadband providers, the Telecom Rate must be the uniform rate (regardless of whether the voice, information, or other services provided by the cable broadband providers are classified as telecommunications carriers).

Section 224(e) requires the Commission to apply the Telecom Rate to any attachment used by a "telecommunications carrier to provide telecommunications services."[66] This subsection provides no exemption for telecommunications carriers that also provide video or internet services. Therefore, no formula other than the Telecom Rate can apply to a telecommunications carrier. It is not disputed that at least a significant subset of broadband providers are telecommunications carriers. For example, by definition, any CLEC broadband provider is a telecommunications carrier that provides telecommunications services. Therefore, if the Commission establishes a single rate formula to both cable and telecommunications carriers, it must be the Telecom Rate formula.

2. The Commission can establish the Telecom Rate as the single, unified broadband rate.

Cable commenters argue that the Commission can apply the Cable Rate to all broadband attachments, but they give no legal justification for why the Commission must apply the Cable Rate rather than the Telecom Rate to all broadband attachments.[67] The Commission has authority to establish a unified broadband rate, because it has authority to apply the Telecom Rate to cable broadband providers. Under section 224, as interpreted by the Supreme Court in

---

[66] 47 U.S.C. § 224(e).

[67] *See, e.g.,* Comcast Comments at 35-37; NCTA Comments at 21-22.

NCTA v. Gulf Power,[68] the Commission can apply a rate other than the Cable Rate to CATV attachments used to provide commingled cable and internet service, because the Cable Rate established in section 224(d) applies only to CATV attachments used "solely to provide cable service."[69] As the cable commenters admit, virtually all cable providers are no longer providing "solely" cable service.[70] Accordingly, the Commission has authority to apply a different, higher rate, such as the Telecom Rate, to cable attachers.

3. The Commission cannot override the plain language of section 224(e) regarding allocation of common space costs under the Telecom Rate.

TWTC wrongly argues that the term "nondiscriminatory" in section 224(e)(1) authorizes the Commission to apply the Cable Rate to all broadband providers.[71] In other words, TWTC asks the Commission to ignore Congress's specific language in the same subsection requiring the Commission to apply a different formula (i.e., the Telecom Rate) to pole attachments made by telecommunications carriers. Under basic principles of statutory interpretation, a general statutory directive cannot be used to override a specific limitation provided for in the same statute.[72] Contrary to TWTC's argument, the "non-discrimination" requirement of section 224(e)(1) applies only as among telecommunications carriers and cannot override the specific

---

[68] *Nat'l Cable and Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*NCTA v. Gulf Power*").

[69] The court stated that "[t]he 1996 amendments limited § 224(d) to attachments used by a cable television system 'solely to provide cable service'…." *Id.* at 336.

[70] *See* Advertisement, *Cable. Broadband in the Blink of an eye.* Wash. Post, April 15, 2008, at A11; *see also* Figure 1.

[71] TWTC Comments at 4.

[72] *NCTA v. Gulf Power*, 534 U.S. at 335 (explaining that "specific statutory language should control more general language when there is a conflict between the two").

cost allocation requirements of sections 224(e)(2)-(3). Section 224(e)(1) directs the Commission to prescribe "regulations *in accordance with this subsection* to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services . . . ."[73] The phrase "in accordance with this subsection" means in accordance with all of subsection (e). Subsection (e) provides for a specific formula for calculating a rate for telecommunications carriers. Paragraph (e)(2) requires that the cost of providing space other than usable space be apportioned so that "such apportionment equals two-thirds of the costs of providing space other than usable space" among attaching entities.[74] The general requirement of paragraph (e)(1) that such rates be "just, reasonable, and nondiscriminatory" must be read in the context of the specific requirements of the entire subsection.

4. Prior court decisions do not support extending the Cable Rate to all broadband attachments.

Several commenters cite cases involving the Cable Rate to support the notion that the Cable Rate should apply to all broadband attachments. For example, Comcast states that "[t]he Commission and the courts have on every occasion found the current cable pole rate to be more than fully compensatory to utility owners."[75] Similarly, NCTA claims that the courts have held that the Cable Rate is not a subsidy.[76]

Nothing in the decisions cited by Comcast and NCTA supports the adoption of the Cable Rate or the Telecom Rate for broadband attachments. *NCTA v. Gulf Power* was a case of

[73] 47 U.S.C. § 224(e)(1).

[74] *Id.* at § 224(e)(2).

[75] *See* Comcast Comments at iii.

[76] *See also* NCTA Comments at 8-9, 12, Appendix A.

statutory interpretation regarding whether the Commission could apply the Cable Rate to cable systems that offer commingled cable television and internet service.[77] The court deferred to the Commission to apply the Cable Rate to commingled cable and internet attachments, but the court did not hold that the Commission must apply the Cable Rate in that situation, and did not address whether the Telecom Rate is just and reasonable.[78] Similarly, in *FCC v. Florida Power*, the Court was addressing the question of whether pole attachments effected a taking of utility property under the Fifth Amendment of the U.S. Constitution. It did not reach the issue of compensation.[79] Moreover, that case took place prior to the 1996 Act amendments to section 224, which mandated access for pole attachments. Thus, it was subject to a lesser standard of review than is presently the case, now that the courts have held that pole attachments effect a *per se*, physical taking of utility property.[80] In a physical takings case, the property owner generally must receive the "full monetary equivalent of the property taken."[81] EEI and UTC submit that

---

[77] *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002).

[78] *Id.*

[79] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (holding that pole attachments do not constitute a regulatory taking because the rates are not "confiscatory". Note that Justice Powell and Justice O'Connor concurred with the majority but took issue with the "confiscatory" standard and they cited *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), which stated that the "just and reasonable" standard required that "the return to the equity owner should be commensurate with returns on investment in other enterprises having corresponding risks."

[80] Note that the Eleventh Circuit in *Alabama Power v. FCC*, 311 F.3d 1357, at 1367-68 (11th Cir. 2002), distinguished the difference between the standard that applies in ratemaking cases and those—like pole attachments—that involve a physical taking of property. In ratemaking cases, "rates can be regulated so long as they are not so 'unjust' as to be confiscatory, and within this range the regulatory agency has broad discretion. …When a physical taking is at issue, however, a different analytical hat must be worn. In physical takings cases, the properly owner generally must receive the 'full monetary equivalent of the property taken.'" *Id.* at 1368, *citing Consolidated Gas Co. of Fla., v. City Gas Co. of Fla.*, 912 F.2d 1262, 1314, n.52 & 1319 (11th Cir. 1990) and *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

[81] *Id.*

the full monetary equivalent of the taking should include the fully allocated costs of both the usable and unusable space, as described herein; and nothing in the case law precludes the FCC from establishing such a rate for broadband attachments.[82]

In other cases, the courts specifically acknowledge that the Telecom Rate is also just and reasonable. In *Alabama Power Company v. FCC,* the court noted that:

> the Telecom Rate provided in 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments. The FCC reached a perfectly logical conclusion when it observed: "'Congress' decision to choose a slightly different methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates."[83]

Furthermore, in *Georgia Power v. Teleport*, the court held that the Telecom Rate provides just compensation.[84] The court also recognized that, under the Telecom Rate, "rent can be assessed for the unusable space on a utility pole (essentially the part of the pole near the ground where no attachments can be placed) but which is nonetheless necessary to support the remainder of the pole, where attachments can be placed."[85] The Commission should recognize that because the

---

[82] Note that *Alabama Power v. FCC* held that marginal costs represent only the minimum compensation allowed under law; Congress and the FCC have the discretion to establish a rate within the range of "just and reasonable" rates provided under section 224. *See also id.* at 1371, n 23 (explaining that Congress exercised its discretion to establish a different rate for telecommunications attachments).

[83] *Alabama Power v. FCC*, 311 F.3d at 1371 n23, *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49.

[84] *Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d 1033 at 1047 (11th Cir. 2003).

[85] *Id.* at 1037.

compensation provided under the Telecom Rate is just and reasonable, it cannot reasonably be described as "overcompensating" the utility and should reject such erroneous claims.

5. A unified rate for broadband attachments should not be based on marginal cost.

The Commission should reject Comcast's request for the Commission to establish a marginal cost-based rate for all broadband attachments.[86] Comcast argues that the current Cable Rate over compensates electric utilities because "[j]ust compensation for pole attachment rent is the marginal cost of making an attachment."[87] However, Comcast's focus on marginal costs is irrelevant and misleading because the statute does not define just compensation as marginal cost. On the contrary, neither the Cable Rate nor the Telecom Rate requires the Commission to establish the rate on the basis of marginal costs. Moreover, under the Telecom Rate, marginal cost cannot be the basis for the rate at all.

Contrary to Comcast's claim, the Commission has consistently rejected the additional (i.e., marginal) cost "floor" option in favor of an allocation of all the costs of the pole on the basis of the percentage of usable space occupied. The Commission has correctly chosen not to base its calculation of the Cable Rate on marginal cost. Under section 224(d), the Commission has the *option* of using "*not less than* the additional cost of providing pole attachments" as the basis of the rate of cable attachments used solely to provide cable service.[88] Section 224(d) expressly authorizes the Commission to allocate not only operating expenses, but also the

---

[86] Comcast Comments at 15-19.

[87] *Id.* at 4.

[88] 47 U.S.C. § 224(d) (emphasis added).

utility's "actual capital costs" attributable to the pole plant.[89] As the courts have acknowledged, the Cable Rate "requires the attaching cable company to pay for any 'make-ready' costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make-ready and maintenance costs), in addition to some portion of the fully embedded cost."[90]

For attachments by telecommunications carriers to provide telecommunications services, section 224(e) does not give the Commission the option to consider marginal cost at all.[91] Instead, section 224(e) requires the attaching telecommunications carrier to pay a portion of the entire actual cost of the pole on the basis of a space factor.[92] Section 224(e) makes no mention of marginal (i.e., incremental or "additional") costs. Instead, under the Telecom Rate, Congress appears to have recognized that marginal cost was not sufficient compensation for pole attachments used to provide telephone service, because the Telecom Rate requires the attaching entity to pay both for marginal cost and an even greater portion of the embedded cost than is authorized under the Cable Rate formula in section 224(d).[93] As the courts have acknowledged, the Telecom Rate provides for compensation in addition to marginal cost and is nevertheless a

---

[89] *Id.*

[90] *Alabama Power v. FCC*, 311 F.3d at 1369-1370.

[91] Even with respect to attachments used solely to provide cable service, Congress did not provide that marginal cost was the only just and reasonable rate. 47 U.S.C. § 224(d) gives the Commission the option of providing for a rate based on a proportionate allocation of all the costs of the pole based on a percentage of usable space occupied.

[92] The Telecom Rate is the sum of the attaching entity's proportionate share of the cost of the usable space plus an equal share of two-thirds of the cost of the "other than usable" space (i.e., common space). 47 U.S.C. § 224(e)(1)-(2).

[93] 47 U.S.C. § 224(e) requires the attaching entity to pay its equal share of two-thirds of the cost of the "other than usable space." By contrast, under 47 U.S.C. § 224(d), a cable-only attacher is required to pay only the fraction (of the entire pole cost) that corresponds to the amount of usable space it occupies.

just and reasonable rate.[94] In view of the fact that the statutory Telecom Rate requires payment of embedded costs, not just marginal cost, the Commission should reject Comcast's claim that marginal cost must be the basis of the unified broadband rate.

6. The proportion of space occupied cannot be the only basis for a unified rate.

The Commission should disregard Comcast's argument that the Cable Rate allocates the entire cost of the pole and that therefore there is no need to adopt a different rate to provide for full cost allocation.[95] It is not disputed that the Cable Rate provides for an allocation of the entire cost of the pole, but this point is not relevant. The relevant issue is how the cost of common space is allocated under the Cable Rate as compared to the Telecom Rate. The Cable Rate allocates the whole pole cost on the basis of the percentage of usable space occupied. The Telecom Rate, by contrast, allocates the cost of usable space on the percentage of usable space occupied, but makes a separate allocation of the cost of common space (i.e., "other than usable space") on the basis of the number of attaching entities. Any unified broadband rate must likewise allocate the cost of the common space on the basis of the number of attaching entities.

[94] *See Georgia Power v. Teleport Comm. Atlanta*, 346 F.3d at 1046; *Alabama Power v. FCC*, 311 F.3d at 1371 n23, *citing In the Matter of Ala. Cable Telecomm. Ass'n*, 16 FCC Rcd. 12,209, ¶ 49.

[95] Comcast Comments at vi.

B. THE COMMISSION SHOULD IMPROVE THE IMPLEMENTATION OF THE TELECOM RATE TO FURTHER REDUCE COMPETITION-DISTORTING SUBSIDIES.

The Commission should reject arguments that the current Cable Rate does not provide a subsidy at the expense of electric consumers.[96] As demonstrated above, and in EEI and UTC's initial comments,[97] the Cable Rate is a subsidy rate because it does not fully and fairly allocate the costs of common space. Although the Telecom Rate provides for a more equitable allocation of common space costs than the Cable Rate, the Telecom Rate is nevertheless itself is also a subsidy rate because it provides for an allocation of only two-thirds of the so-called "unusable space." The Commission's current presumptions relating to the number of attaching entities and the allocation of safety space costs exacerbate this subsidy effect.

Applying the current Telecom Rate to all jurisdictional attachments will not, by itself, eliminate subsidies still afforded to attaching entities at the expense of electric consumers. The Commission must also change the manner in which the formula is implemented. As explained in EEI and UTC's initial comments, a decade of experience shows several of the presumptions the Commission uses in applying the Telecom Rate are inaccurate. In examining the extent of the Commission's authority to modify the implementation of these rates, EEI and UTC recommend that the Commission specifically modify these presumptions to ensure that they no longer result in competition-distorting subsidies at the expense of electric consumers. EEI and UTC acknowledge that general rules and presumptions can be useful in rate calculations, provided they reflect actual conditions and do not favor the interests of communications attachers at the

[96] *See, e.g.,* Time Warner Cable Comments at ii; Comcast Comments at 13; State Cable Associations Comments at 12.

[97] EEI and UTC Comments at 35.

expense of the utilities or their customers. However, under current regulations, many of the presumptions are unrealistic in a manner that results in substantial subsidies to jurisdictional attachers at the expense of the host utilities. To eliminate such subsidies, EEI and UTC urge the Commission to make several modifications to the presumptions and general rules relied upon in calculating pole attachment rates under the Telecom Rate. Specifically, as explained in EEI and UTC's initial comments,[98] the Commission should modify its regulations to:

1. Allocate the communications worker safety zone space to common (i.e., "unusable") space to require communications attachers, whose workers the safety zone was created to protect, to pay their fair share of the cost of that space;

2. Lower the presumed numbers of rural and urban attaching entities from five to three to reflect actual prevailing conditions;

3. Do not count the utility as an "attaching entity" in calculating the allocation of common space;

4. Ensure that space allocation reflects the actual number of attachments made by the attaching entity;

5. Clarify that space allocations for special types of attachments must reflect the full amount of space occupied; and

6. Establish a presumption that executed pole attachment agreements are just and reasonable to avoid the "sign and sue" problem.

IV. WIRELESS ATTACHMENTS PRESENT NEW CHALLENGES THAT SHOULD NOT BE SOLVED BY UNIFORM, NATIONAL SOLUTIONS.

Wireless attachments are a relatively recent development in pole attachments. New technologies such as DAS systems and WiMAX have made utility distribution poles attractive targets for wireless siting. Wireless attachments are distinctly different from wireline attachments. Moreover, there are various different technologies and configurations of wireless

[98] *Id.* at 75-90.

attachments. For example, NextG explains in its comments that its DAS networks "typically include either an omnidirectional antenna or a directional panel antenna, as well as an equipment box located on the pole's unusable space that is of differing size depending on the particular deployment."[99] NextG also explains that its antennas "will be installed in some cases in the 'communications space' on the pole (i.e., mid-pole), but in some cases on the pole top." Finally, NextG explains that it may need to install pole top extensions of 4-6 feet in order to maintain proper space clearances.[100] As such, wireless attachments vary in design and raise complex issues for utilities that defy uniform solutions.

Actually accommodating wireless attachments on poles is even more complicated. For example NextG explained that the communications space on the pole may be fully occupied in some markets, and even pole tops may be occupied in many cases.[101] Utilities may set a taller pole to make space, but they are not required to do so. Changing out the pole involves a complex process to coordinate with all of the other attaching entities that are on the pole. Additional guying and anchoring may be necessary to strengthen the pole even if it is not changed out. Finally, there are also radio frequency ("RF") exposure guidelines that need to be followed, which means additional training for utility linemen.

---

[99] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of NextG Networks, Inc. at 4 (filed March 7, 2008) ("NextG Comments").

[100] *See id.*

[101] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Ameren Services Company and Virginia Electric Power at 38 (filed March 7, 2008) ("Ameren and VEP Comments") ("In many regions, electric utilities attach their facilities to the very top, flat, portion of the pole. This location of electric facilities makes any other attachment at this location impossible on every pole").

These are just some of the issues associated with wireless attachments. Therefore, it should be readily apparent from this general overview that accommodating wireless attachments is a complex challenge that is distinctly different from accommodating standard wireline attachments. As such, the Commission should not adopt uniform requirements for wireless attachments, due to the variations in the types of equipment and the unique issues associated with accommodating wireless attachments.

In addition, the Commission should not lose sight of the fact that there are alternatives to siting wireless equipment on utility poles. This equipment can be and has been sited on water towers, sides of buildings, and of course rooftops, as well as towers. In fact, there is a robust market for wireless collocation to these facilities. While zoning restrictions may limit options, add costs, and cause delays for the construction of new towers, wireless carriers can collocate their facilities on existing structures besides utility poles. The DAS Forum recites several examples where its members have been able to deploy DAS systems without using utility poles.[102] Thus, the Commission need not establish additional rules or presumptions with regard to wireless attachments.

---

[102] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of the DAS Forum, a Membership Section of PCIA—The Wireless Infrastructure Association at 5-6 (filed March 7, 2008) ("DAS Forum Comments").

A. THE COMMISSION SHOULD NOT PREEMPT STATE AND LOCAL JURISDICTION.

The Commission should reject proposals for the federal preemption of state and local laws and regulations affecting pole attachments.[103] Wireless providers characterize state and local regulations as "barriers" that should be preempted by the Commission,[104] and argue that federal preemption is necessary to bring "national uniformity" in the pole attachment regulations. They object to local zoning requirements, and further assert that "[w]hile utility poles often are sited in public rights of way, they are not *themselves* rights of way."[105] This position indicates that wireless providers view pole attachments as a means to circumvent state and local jurisdiction to manage rights-of-way and to recover the fair and reasonable costs thereof.[106]

---

[103] *See, e.g.*, DAS Forum Comments at 15-16; *and Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of T-Mobile USA, Inc. at 10 (filed March 7, 2008) ("T-Mobile Comments") (demanding preemption of state laws and regulations that require wireless providers to obtain a CPCN in order to obtain access for pole attachments).

[104] *See, e.g.*, DAS Forum Comments at 15 (calling states' regulatory procedures "arcane or even archaic, and sometimes simply biased in favor of pole owners."); and NextG Comments at 17, n 24 ("NextG frequently encounters opposition or difficulty from local governments. In many communities, each of its Node attachments to utility poles, simply because they involve a wireless device, are subject to complex, burdensome, lengthy, and wholly discretionary 'zoning' approvals. While NextG believes that many of these municipal processes are preempted by Section 253 of the Communications Act, 47 U.S.C. § 253, nonetheless, they are far too frequent, and thus, since denial of access to pole tops could double of [sic] the number of Nodes subject to zoning and at the same time double the impact that will be identified by local authorities it poses an [sic] multi-layered potential barrier to NextG's deployment").

[105] DAS Forum Comments at 15, n. 29 (emphasis in original) (distinguishing pole attachments from rights of way, which are expressly subject to state and local authority under section 253(c) of the Communications Act).

[106] *See* 47 U.S.C. § 253(c) (stating "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government").

This is because if wireless providers built their own facilities in public rights-of-way, they would certainly be subject to local zoning requirements and rights-of-way fees. However, if wireless providers attach to utility poles, and if state and local jurisdiction does not apply, they would avoid these obligations.

The Commission should reject arguments for federal preemption in this area. Both the statute and the Commission's past decisions have recognized that pole attachments are generally subject to state and local jurisdiction, including the placement of wireless facilities. Federal preemption of state and local authority, or *de facto* preemption by adopting federal rules for wireless attachments, would frustrate Congress's intent when it established section 224(c), which allows the states to reverse preempt the Commission's pole attachment jurisdiction. Additionally, federal preemption in this area would also frustrate Congress's intent when it established sections 332(c)(7) and 253(c), which preserve local authority over wireless siting and state and local authority over the management of rights-of-way. Congress expressly preserved local zoning authority over wireless siting when it granted the FCC its preemption authority.[107]

Federal preemption would contradict one of the Commission's fundamental principles that pole attachments are subject to state and local property law. The Commission has long held that state and local requirements affecting pole attachments are entitled to deference.[108] Additionally, the Commission has recognized that the scope of access is subject to utilities' ownership and control of poles, ducts, conduit and rights of way, which is a matter of state

---

[107] *Id.* at §§ 253(c), 332 (c)(7).

[108] Access Order, 11 FCC Rcd. 15499 at ¶1154 ("we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c)").

law.[109] Although the Commission may preempt state and local laws and regulations that create barriers to entry by telecommunications providers, it has recognized that states may regulate rights of way on a non-discriminatory basis and impose restrictions to protect the public safety and welfare.[110]

Finally, as EEI and UTC and numerous other utilities have commented on the record, the FCC should not adopt uniform, national requirements that would supersede the expertise of states, localities, and utilities regarding the content and application of standards for safety, reliability, and engineering matters, including capacity and reliability regulations.[111] State and localities must have flexibility to adopt requirements to respond to local conditions and circumstances, as necessary. As the Florida IOUs stated in their comments:

> [m]atters of safety and reliability are best addressed by individual utility standards in concert with a utility's state regulatory commission. The Florida Storm Hardening proceedings are a perfect example of a state's exercise of authority over the safety and reliability of electric distribution systems and illustrate the potential conflict which would arise in the event the Commission oversteps its jurisdiction and regulates in an area where it admittedly lacks expertise.[112]

PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation further explained in their comments that "state commissions are in day-to-day contact with the utilities under their jurisdiction, and are the most appropriate bodies with respect to evaluating

---

[109] *Id.* at ¶1179. *See also In re Promotion of Competitive Networks*, 15 FCC Rcd. 22983 at ¶76 ("we note that Section 224 applies only to utilities, and was not intended to override whatever authority or control an MTE owner might otherwise retain under the terms of its agreements and state law").

[110] *Id.* at ¶1155.

[111] *See* EEI and UTC Comments at 38-39; Ameren and VEP Comments at 12-13; Florida IOU Comments at 5-10.

[112] Florida IOU Comments at 5-6.

and understanding local utilities and local operating conditions."[113] As such, the Commission should not interfere with state regulations that affect wireless attachments.

B. THE COMMISSION MAY NOT REQUIRE UTILITIES TO EXPAND CAPACITY.

The Commission should reject arguments to require utilities to expand capacity in order to accommodate access for wireless attachments.[114] Wireless providers claim that ILECs are permitted under joint use agreements to expand capacity when needed, and therefore that CLECs and CATV attachers should be accorded the same rights.[115]

Consistent with its precedent, the Commission should reject these arguments because utilities are not required to expand capacity to accommodate pole attachments[116] In *Southern Co. v. FCC*, the court found that such a requirement would be "contrary to the plain language of Section 224(f)(2)."[117] Furthermore, the court also found that it is clear that "Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to

[113] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation at 24-25 (adding that "the FCC has recognized their expertise, and *presumes* state and local requirements affecting pole attachments to be reasonable and entitled to deference *even if the state has not sought to preempt federal regulations under Section 224(c). State law addresses* electric utility safety and reliability and the state public service commissions…are intimately involved in monitoring and working with the electric utilities in their states") (emphasis added).

[114] T-Mobile Comments at 6-7 (demanding that utilities should be required to expand capacity on a non-discriminatory basis to accommodate wireless attachments).

[115] *See id.*

[116] *Southern Co. v. FCC*, 293 F.3d 1338, 1346-1347 (11th Cir. 2002).

[117] *Id*. at 1346.

third-party attachers."[118] The court found that while utilities must provide non-discriminatory access for pole attachments as a general rule, "attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they not apply … [subverts] the plain meaning of the Act."[119] Thus, even if it were true that utilities permit ILECs to expand capacity to accommodate their attachments, the Commission must recognize that utilities could still not be required under the statute to expand capacity for wireless providers, and should reject these proposals.

C. THE COMMISSION SHOULD REJECT PROPOSALS TO MANDATE UTILITY REPORTING REQUIREMENTS AND ADOPT ACCELERATED DOCKET RULES.

The Commission should reject requests to impose various reporting requirements on utilities, including identifying their distribution facilities, and posting their pole attachment agreements, fee schedules, list of approved contractors, and any other necessary forms and applications.[120] EEI and UTC do not believe that these proposed reporting requirements will expedite the negotiation of agreements and the deployment of facilities, and do not believe this proposal is cost-effective.

It is not necessary to require utilities to identify their distribution facilities as proposed because utilities already provide eligible attaching entities with pole location and conduit availability, as needed. The speculative benefit of posting this information publicly would be

---

[118] *Id.*

[119] *Id.*

[120] *See* T-Mobile Comments at 3, 5, and 8. *See also* NextG Comments at 24 (seeking a rule prohibiting utilities from excluding access to street light poles and pole with primary lines).

greatly outweighed by the potential security risk it would pose to critical infrastructure. Wireless providers fail to explain how posting such information would reduce delays in negotiating access for wireless facilities. Conversely, utilities have legitimate security reasons for not posting such information publicly. Moreover, if utilities are unreasonably restricting access to distribution infrastructure, wireless providers may seek relief through the pole attachment complaint process. Therefore, the Commission should recognize that it is unnecessary to require utilities to identify their distribution facilities and that such an affirmative requirement could pose serious security risks to the electric distribution system.

The Commission also should not require utilities to post their agreements and fee schedules for wireless attachments. This is unnecessary because utilities are already required to process a request for pole attachments and approve or deny it in writing within 45 days.[121] The Commission does not need to prescribe the manner by which utilities meet that deadline. While providers might prefer that utilities adhere to a master licensing agreement for wireless attachments, it may not be practical to do so because wireless attachments are unique in nature and the rates, terms and conditions may vary depending on the equipment and the infrastructure that is involved. Moreover, there are relatively few requests for wireless attachments compared to wireline attachments, and so it is less likely that there would be administrative efficiencies gained by posting wireless agreements and fees. The decision to post such information should be voluntary, and several utilities have posted information to their websites already.[122] As such, the

[121] *See* 47 C.F.R. §1.1403(b).

[122] *See* Comments of T-Mobile at 3, n. 3 (stating "Dominion provides a user-friendly website for wireless collocation purposes" *available at* http://www.dom.com/about/collocation/dpantennas /index.jsp. *See also* Portland General Electric's webpage at http://www.portlandgeneral.com/ business/utility_services/uam/wireless_antenna_colocation.asp?bhcp=1).

Commission need not require utilities to post their agreements and fee schedules for wireless attachments; what matters is that access is approved or denied within the 45-day deadline.

The Commission should also continue to review the rates, terms, and conditions of access for wireless attachments on a case-by-case basis through the current complaint process.[123] The Commission should not adopt accelerated docket rules to resolve pole attachment complaints involving wireless attachments. First, these proposals are unwarranted because there have been few such complaints, and claims of unreasonable delays in the process are unsupported. Moreover, the Commission has already employed alternative dispute resolution procedures and many pole attachment complaints have been settled between the parties.[124] Thus, there is no reason to adopt accelerated docket rules specifically for complaints involving wireless attachments.

D. THE COMMISSION SHOULD NOT PRESCRIBE UNIFORM, NATIONAL TECHNICAL STANDARDS FOR WIRELESS ATTACHMENTS.

The Commission should reject proposals to establish various presumptions for wireless attachments and "best practices" for pole attachments. The Commission should reject requests that the Commission establish a rebuttable presumption favoring access for pole top antennas

---

[123] *But see Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Crown Castle Solutions Corp. at 6-8 (filed March 7, 2008) ("Crown Castle Comments") (requesting that the Commission impose arbitration to resolve pole attachment complaints). *See also* Comments of T-Mobile at 8.

[124] *See, e.g., Charter Comm., Inc. v. Union Electric d/b/a AmerenUE*, 23 FCC Rcd. 135 (2008); *CenterPoint Energy Houston, LLC v. Texas & Kansas City Cable Partners d/b/a Time Warner Cable*, 21 FCC Rcd. 138 (2006).

specifically and wireless attachments generally.[125] Similarly, the Commission should also reject proposals to establish presumptions for wireless access to certain infrastructure, such as street light poles and poles with primary attachments, and access to certain parts of the pole, such as the unusable space and the power space.[126] In addition, the Commission should reject adopting so-called "best practices" for pole attachments and make-ready, including deadlines and other restrictions that utilities would be required to follow.[127]

EEI and UTC strongly oppose these proposed presumptions and so-called best practices. The proposed presumptions would turn section 224(f)(2) on its head by making utilities bear the burden of justifying their safety standards.[128] Utilities could only deny access if there was a violation of the NESC, and they would need to obtain an order from the Commission in order to rebut a presumption favoring access.[129] Moreover, these proposals would nullify utility safety standards that exceed the NESC. The NESC is not a design specification; it merely provides guidelines and should not be the exclusive measure for determining access.[130] Utilities must also

---

[125] *See, e.g.*, Crown Castle Comments at 6; NextG Comments at 17, 26-28; and *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of CTIA—The Wireless Association at 13 (filed March 7, 2008) ("CTIA Comments").

[126] *See* NextG Comments at 18-20, 23-25.

[127] *See* Crown Castle Comments at 9; NextG Comments at 20, 23; and DAS Forum Comments at 9-11.

[128] *See* NextG Comments at 19 (stating that "[i]f a utility seeks to impose a standard that goes beyond the NESC, the pole owner should bear the burden of explaining to the provider, and ultimately to the Commission, why they [sic] have adopted a stricter practice than the NESC").

[129] *Id.* at 26.

[130] National Electrical Safety Code 2007 Edition at 1 ("NESC") ("These rules contain the basic provisions that are considered necessary for the safety or employees and the public under the specified conditions. This Code is not intended as a design specification or as an instruction

be allowed to supplement the NESC with their own safety standards. Similarly, the proposed best practices would impose arbitrary requirements and compromise infrastructure reliability and security. As such, the FCC should not adopt these presumptions and best practices as more fully explained below.

1. The proposed presumptions would contradict section 224(f)(2) of the Communications Act and the Commission's basic guidelines for access, as well as compromise critical infrastructure safety and reliability.

As a general matter, the Commission should reject these proposals because such presumptions would contradict section 224(f)(2), which permits utilities to deny access for reasons of safety, reliability, insufficient capacity and generally applicable engineering purposes. Utilities have the discretion to permit or deny a request for access on a non-discriminatory basis, which is subject to review by the Commission in a pole attachment complaint proceeding. These presumptions would require utilities to disprove an attachers' right to access, rather than placing the initial evidentiary burden on the attacher, as is currently required under the Commission's current complaint procedures. Moreover, wireless providers would set an unreasonably high standard requiring the Commission to make specific capacity, safety, reliability, and engineering findings with respect to each pole to allow a utility rebut these presumptions, making it extremely difficult to deny access as a practical matter.[131] As such, the Commission may not

manual"); s*ee also Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments,* WC Docket No. 07-245, RM-11293, RM-11303, Comments of Oncor Electric Delivery at 5-6 (filed March 7, 2008) ("Oncor Comments").

[131] *See* NextG Comments at 18 (stating that "[t]o rebut the presumption as to a specific attachment to a specific pole, a pole owner should be required to obtain an order from the Commission based on conclusive evidence holding that a proposed attachment to a particular pole cannot be accomplished because of insufficient capacity or safety, reliability, and generally applicable engineering purposes that cannot be remedied through make-ready, pole expansion or

adopt these presumptions, because they would effectively negate section 224(f)(2), which would undermine the safety and reliability of utility infrastructure.

Consistent with the statute, when the Commission established its access rules in 1996, it deliberately decided to avoid prescribing detailed requirements for pole attachments in recognition that "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation."[132] Nonetheless, wireless providers propose a host of presumptions and rules regarding pole top antennas, street light poles, ADSS fiber in the power space, and RF emissions—which if adopted would send the Commission down a path that it deliberately chose to avoid.

The Commission should reject these presumptions because they raise significant concerns for safety and reliability. For example, "adding pole top antennas could destabilize and threaten the safety of [utilities] poles and lines because of the high occurrence of lightning and strong wind," which would reduce the Basic Insulation Level ("BIL") rating and increase the likelihood of customer outages due to lightning.[133] Also, wireless antennas raise unique issues with regard

---

change out at the attaching party's expense or other engineering solutions that are acceptable under generally applicable engineering or safety standards").

[132] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd. 15499, 16067-16068 at ¶1143 (1996) ("Local Competition Order") (stating "[w]e conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis").

[133] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Alabama Power, Georgia Power, Gulf Power and Mississippi Power at 34 (filed March 7, 2008).

to clearances and work space, as well as loading.[134] Due to these issues, it may not be technically feasible or safe to permit access to certain utility poles.[135] Similarly, utilities have legitimate concerns about RF exposure from wireless attachments to poles. Utility workers may have prolonged exposure to RF from wireless attachments on poles, which may exceed FCC guidelines and OSHA requirements.[136] These RF exposure requirements cannot be simply ignored as some wireless providers suggest; they apply to workers as well as the general public.[137]

---

[134] *See, e.g.*, NESC Rule 236 and 237 pertain to work space minimum requirements. *See also* Florida IOUs Comments at 16-17 (stating that pole top antennas increase the wind loading twice as much than if the wireless antenna was located at 16 feet).

[135] *See* NESC Rule 250 D, which requires that if any portion of a distribution pole extends sixty (60) feet above ground level, the pole and its supported facilities (e.g., crossarms, braces, insulators, attaching hardware, etc.) be designed to withstand extreme ice *with concurrent* wind loading. The great majority of distribution poles extend less than sixty (60) feet above ground level but many poles would exceed the sixty (60) feet threshold with the attachment of pole top wireless facilities such as antennas that are typically several feet high (emphasis added).

[136] *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, Federal Communications Commission Office of Engineering & Technology, OET Bulletin 65, Edition 97-01, August 1997; *and Guide for RF Protection of Personnel Working in the Vicinity of Wireless Communications Antennas Attached to Electric Power Line Structures*, Institute of Electrical and Electronic Engineers, Draft Standard P1654, June 2, 2007.

[137] *See* NextG Comments at 27 (stating that "[s]o long as a wireless attachment is within the Commission's standards for maximum permissible exposure for general population uncontrolled exposure, utilities must be prohibited from citing RF emissions as grounds for denying access"). This statement exhibits a troubling lack of understanding by NextG that there are separate RF exposure limits for workers and the general public. It also completely ignores OSHA requirements that also apply.

2. The Commission should not rely on the NESC exclusively.

It is also insufficient to rely exclusively on the NESC to determine whether access should be permitted or denied.[138] The NESC only provides a framework and should not serve as a design specification for wireless attachments.[139] Utility standards should apply as well. For example, the NESC refers to RF Exposure limits and incorporates them by reference; but it does not specify how compliance with these limits can be achieved.[140] Moreover, loading, work space, and clearances are specified, but federal, state and local requirements, as well as utility standards may exceed those requirements. It should also be noted that while the NESC has been adopted into law by a number of states, there are a few states, such as California, that follow their own standards for pole attachments. In addition, there are many states that recognize utility standards that exceed the NESC.[141]

---

[138] *But see* Crown Castle Comments at 6; and NextG Comments at 17.

[139] National Electrical Safety Code 2007 Edition at 1 (stating that "[t]hese rules contain the basic provisions that are considered necessary for the safety or employees and the public under the specified conditions. This Code is not intended as a design specification or as an instruction manual").

[140] *See* NESC Rule 420Q.

[141] *See Rules for Overhead Electric Line Construction*, Public Utilities Commission of the State of California General Order 95, January 2006. *See also Order Instituting Rulemaking to Revise Commission General Order Number 95 Pursuant to D.05-01-030*, Opinion Adopting Proposed Rule 94 in General Order 95 Dealing with Installation of Wireless Antennas on Utility Poles, Rulemaking 05-02-023 (Feb. 24, 2005) (adopting rules to limit RF exposure, such as power shut down and notice requirements). *See also* Fla. Admin. Code 25-6.0342, Electric Infrastructure Storm Hardening (stating that "[a]s part of its storm hardening plan, each utility shall maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles (Attachment Standards and Procedures). The Attachment Standards and Procedures *shall meet or exceed* the edition of the National Electrical Safety Code (ANSI C-2) that is applicable pursuant to Rule 25-6.034, F.A.C. so as to assure, as far as is reasonably practicable, that third-party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy, or

EEI and UTC oppose imposition of the so-called "best practices" proposed by wireless providers, such as mandatory deadlines for make-ready.[142] The Commission should especially reject such "best practices" for wireless attachments because of the variables and the risk involved with making these attachments. They raise unique loading and clearance issues and are often located near or in the electrical space on the pole.[143] They also often require associated equipment, such as boxes and conduit that may be located in the unusable space. Finally, they have unique power requirements, which further distinguish them from regular wireline attachments. Depending on the size of the project and the extra equipment required, additional time may be required to complete preconstruction surveys and make-ready. Thus, EEI and UTC oppose certain technical so-called "best practices" for wireless attachments.[144]

---

pole reliability; do not exceed pole loading capacity; and are constructed, installed, maintained, and operated in accordance with generally accepted engineering practices for the utility's service territory"). (emphasis added). *See also* Oncor Comments at 7-8 (noting that Texas requires greater clearance over roads).

[142] *See* Crown Castle Comments at 8-9 (stating that "the Commission should adopt best practices as proposed by Fibertech.") *See also* NextG Comments at 20-21 (calling for 45-day deadlines for completion of pre-construction surveys and make-ready).

[143] *See, e.g.,* NESC Rule 250D requiring strengthening of poles taller than 60 feet. This requirement may demand additional guying and anchoring, which may extend above the primary lines and beyond the bounds of the easement. Moreover, changing out the pole requires notification and coordination with all the other attachers on the pole; adding to the time and expense necessary to complete the make-ready.

[144] Note that the New York Public Service Commission ("NYPSC") rules with regard to deadlines for make-ready only apply to wireline attachments. The NYPSC is currently considering rules for access for wireless attachments, and pole owners have opposed extending the deadlines to wireless attachments because wireless attachments are unique from and raise more complicated engineering issues than wireline attachments. *See Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, Case 07-M-0741, Joint Comments of Owners of Distribution Poles in New York Responding to the Commission's Notice Requesting Comments (filed Sept. 10, 2007).

E. THE COMMISSION SHOULD NOT PRESCRIBE STANDARD RATES FOR WIRELESS ATTACHMENTS BECAUSE THERE ARE SO MANY VARYING TYPES OF ATTACHMENTS.

EEI and UTC oppose standard rates for wireless attachments, due to the fact that wireless attachments are unique and involve so many different costs compared to wireline attachments. Rates should account for these variables. In the past, the Commission has recognized this and deliberately decided to "not adopt separate or detailed regulations at this time for considering complaints about rates … for [wireless] attachments."[145] The Commission should continue to allow utilities and wireless providers to develop rates for wireless attachments on a case-by-case basis. There are no changed circumstances that would justify moving to a standard rate; in fact wireless attachments come in more shapes and sizes than ever before, and their placement on poles raises more complex issues for developing a rate. In any event, these rates are subject to review by the Commission to ensure they are just and reasonable. Therefore, there are sufficient safeguards to ensure that rates for wireless attachments are just and reasonable.

The Commission should reject requests by wireless providers to limit the rate to the space occupied on the pole by the antenna and to exclude the space occupied by associated equipment, such as conduit that runs vertically to boxes that are located in the unusable space. The rate for wireless attachments should recover all the costs of the usable and the proportionate share of the costs associated with the unusable space on the pole. This is particularly true where the associated wireless equipment actually occupies the unusable space on the pole. The

[145] *See Telecom Order* at ¶¶ 117-121 and n. 390; *see also, Reconsideration Order* at ¶¶ 43-45.

Commission should therefore ensure that all costs that are attributable to wireless attachments are included, and not excluded as proposed by wireless providers.[146]

Finally, the Commission should reject blanket arguments by wireless providers opposing higher rates for pole top antennas. EEI and UTC believe that pole top access for antennas raises unique cost issues and that these costs should be recovered on a case-by-case basis. Not only is the top of the pole unique, which the Commission recognizes, but access to it requires special personnel, such as qualified linemen, and equipment, such as bucket trucks.[147] T-Mobile provides a good illustration of this in its comments filed with the Commission in this proceeding.[148] In order to access the wireless pole top attachment, the lineman in the bucket must work in close proximity with live electric lines. Clearly, there are additional costs associated with making and maintaining wireless pole top antennas. Therefore, the Commission should permit utilities to recover those costs, subject to review on a case-by-case basis.

---

[146] *But see* NextG Comments at 12 ("The Commission should further clarify that usable 'space occupied' by a wireless device does not include cables running between the antenna and the equipment box because this space is available for other attachments."); CTIA Comments at 11-12, citing Utah Admin. Code R746-345-5 (A)(3)(e)(i) ("CTIA urges the Commission to clarify that the space occupied by the wireless providers attachments 'may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole'"); T-Mobile Comments at 5 (urging the FCC to exclude costs associated with cables running vertically up the pole.).

[147] *See* NPRM at ¶ 34 (inquiring whether a higher rate should apply to pole top attachments, recognizing that "unlike lateral space, each pole has only one top").

[148] *See* T-Mobile Comments at Appendix 1, slide 6.

V. THE COMMISSION SHOULD REFORM ITS REGULATIONS TO DETER ABUSIVE PRACTICES THAT THREATEN SAFETY, RELIABILITY AND COMPETITION.

Cable industry commenters seek to minimize the seriousness of abusive attachment practices that pose threats to worker safety and critical electric infrastructure reliability.[149] EEI and UTC strongly urge the Commission to reject cable industry comments that seek to diminish the seriousness of unlawful attachment practices that, as the NPRM acknowledges, "have the potential to adversely impact the safety and reliability of an integral component of our nation's critical infrastructure, our electric power system."[150] As EEI and UTC's initial comments in this proceeding demonstrated, the problem of unauthorized and unsafe attachments is widespread and very serious.[151] It is urgently important that the Commission address these abuses, not only to protect the reliability and security of the critical electric infrastructure upon which telecommunications networks depend, but also to eliminate competition-distorting subsidies caused by variations in compliance patterns by jurisdictional attaching entities. The Commission can help deter these abuses by clarifying notice requirements and giving electric utilities the flexibility they need to ensure compliance with applicable safety, reliability, and engineering requirements. Specifically, the Commission should clarify its rules to allow utilities to impose substantial contractual penalties for violations of these requirements. As explained in EEI and UTC's initial comments, the Commission should, in turn, reject proposals for uniform,

---

[149] Time Warner Cable Comments at iv, 54; Comcast Comments at vi, Exhibit 3.

[150] NPRM at ¶ 38.

[151] EEI and UTC Comments at 25-33.

nationwide engineering standards that would further hinder electric utilities' ability to protect the safety and reliability of pole infrastructure.[152]

A. THE COMMISSION SHOULD REJECT ARGUMENTS SEEKING TO DIMINISH THE IMPACT OF UNSAFE POLE ATTACHMENT PRACTICES BY TELECOMMUNICATIONS SERVICE PROVIDERS ON THE ELECTRIC SYSTEM.

The Commission should not be distracted by confusing and non-responsive arguments cable commenters make in response to the Commission's request for comments on safety issues and the prevalence of unauthorized attachments.[153] Comcast in particular attempts to shift the blame for their unauthorized and unsafe attachments to the host utilities. As EEI and UTC, as well as other utility commenters, showed in their initial comments, the problem of unauthorized and unsafe attachments is widespread, serious, and growing. Comcast's photographs and Time Warner Cable's conclusory assertion that unauthorized and unsafe attachments are the result of "utilities' shoddy recordkeeping [sic]" or "sudden reversal of accepted attachment practices" cannot account for reports from across the electric industry that a substantial percentage of all attachments are unauthorized or in violation of safety requirements.[154]

---

[152] *Id.* at 67-74.

[153] *See, e.g.*, Time Warner Cable Comments at iv (alternatively dismissing safety issues as "trumped-up" and blaming them on "poor utility record keeping" or "sudden reversal of accepted attachment practices").

[154] Time Warner Cable Comments at 54; Comcast Comments at Exhibit 3.

1. Comcast's photographs are irrelevant to the problems of unauthorized and unsafe attachments made by jurisdictional attachers.

Comcast presents a series of photographs purporting to show safety violations committed by electric utilities.[155] These photographs pertain to highly technical matters that are far too complex for the Commission to adjudicate on a pole-by-pole basis. The Commission should not attempt to arbitrate these matters, but should allow electric utilities to provide for penalties sufficient to deter abusive practices by attaching entities. None of these photographs has any relevance to the prevalence of unauthorized attachments or safety violations by cable systems and other broadband service providers. The problem of unauthorized attachments, by definition, involves attachments by third parties that "have been installed without a lawful attachment agreement."[156] Electric utilities do not make unauthorized attachments. Electric utilities do, however, conduct pole attachment inventories on a periodic basis. In many cases, these inventories have shown a large and growing problem of unauthorized attachments.

The existence of millions of third-party attachments compounds the difficulty of the utility's task. Electric utilities are accountable to their customers, their linemen, and federal, state, and local regulators to ensure that they protect the safety and reliability of their pole infrastructure. As a result, it is part of each electric utility's core mission to try to identify and correct attachment violations made by any attaching party. As explained in EEI and UTC's initial comments, electric utilities have found very large numbers of safety and engineering

[155] Many of these photos show purported violations by municipal and cooperative utilities, which are not subject to the Commission's pole attachment jurisdiction. Comcast Comments at Exhibit 3, Attachment 1.

[156] NPRM at ¶ 38.

violations committed by third-party jurisdictional attachers. Every attaching, has a responsibility to protect the integrity of pole infrastructure. Accordingly, the Commission's regulations applicable to jurisdictional attachers should provide for sufficiently clear notice requirements and substantial penalties to deter violations.

2. Improvements in utility record keeping reveal large numbers of unauthorized and unsafe attachments.

Time Warner Cable's assertion that unauthorized and unsafe attachment claims are the result of "utilities' shoddy recordkeeping [sic]" is false.[157] Utility record-keeping methodologies vary with respect to third-party attachments, and not all electric utilities have the resources and manpower to track third-party attachment violations in detail. However, many utilities that do collect and maintain data on unauthorized attachments and safety violations by third-party attachers have found large numbers of such violations. For example, PPL Electric Utilities, which in 2002 implemented a tracking system that provides detailed attachment data on a pole-by-pole basis, has found more, not fewer, unauthorized attachments.[158] Specifically, as stated in EEI and UTC's initial comments, PPL Electric Utilities found that 57.1 percent of all new CATV attachments and 30 percent of all new CLEC attachments installed on its poles since 2002 were made without application or notice to the utility.[159]

---

[157] Time Warner Cable Comments at 54.

[158] EEI and UTC Comments at 27.

[159] *Id.*

3. Unauthorized and unsafe attachments have always been, and continue to be, unacceptable.

The argument that unauthorized and unsafe attachments are the result of the "sudden reversal of accepted attachment practices" is false.[160] It makes no sense to say that electric utilities previously "accepted" unauthorized attachments, because an unauthorized attachment is an attachment made without permission and without a lawful agreement. With regard to unsafe attachments, the fact that some safety violations may not previously have been detected or penalized does not mean that they were ever accepted or acceptable. Moreover, some electric utilities have had very good reason to modify their attachment procedures as a result of increased incidences of unsafe and unauthorized attachments. The Commission should recognize that heightened scrutiny by regulators in the wake of reliability incidents or natural disasters, as in the case of the 2003 blackout and the Gulf Coast hurricanes, have led to greater attention to reliability and storm hardening of pole infrastructure.

4. Cable attachers have admitted to making large numbers of unauthorized and unsafe attachments.

The Commission should also recognize that cable and telecommunications attachers have admitted in other forums that they made numerous unauthorized attachments and committed numerous safety violations. For example, Progress Energy reports that various cable systems and CLECs, in the context of a settlement entered following a recent audit, admitted to making 57,170 unauthorized attachments.

---

[160] Time Warner Cable Comments at iv.

B. DETERRENCE OF UNAUTHORIZED AND UNSAFE ATTACHMENTS HELPS, NOT HINDERS, BROADBAND COMPETITION.

Comcast's comments regarding safety are premised on the false notion that electric utilities "increasingly compete with cable and other attachers."[161] As demonstrated above, electric utilities are not the cable industry's competitors. The cable industry's competitors are other communications attachers. Thus, the Commission can best promote competition by ensuring that all jurisdictional attachers comply with the same rules. Specifically, a policy of effective deterrence of unauthorized and unsafe attachments will eliminate competition-distorting, implicit subsidies.

EEI and UTC strongly believe that the Commission's goal of broadband competition is consistent with the electric industry's mission of providing safe, reliable electric service. As explained in EEI and UTC's initial comments, when a competitive provider of broadband services engages in unlawful attachment practices, it gains an unlawful advantage over competitors that choose to comply with applicable notice and safety requirements. To the extent a cable company or other broadband provider makes attachments without application or authorization, it pays no rent for those attachments. To the extent such companies neglect to comply with safety requirements, they may also reduce their costs at the potential expense of workers and electric consumers. The cost savings reaped by attachers that violate the rules represent an additional subsidy enjoyed by communications attachers and a competitive advantage relative to their more law-abiding competitors. To ensure a competitive level playing field, the Commission should revise its regulations to address the problems of unauthorized and unsafe attachments.

[161] Comcast Comments at iii.

C. THE COMMISSION'S REGULATORY APPROACH MUST BE REVISED TO STRONGLY DETER UNAUTHORIZED AND UNSAFE ATTACHMENT PRACTICES.

In view of the hazards that unauthorized and unsafe attachments pose to safety, reliability, and competitive markets, the Commission should reject cable industry comments that diminish the seriousness of these abusive practices by jurisdictional attachers.[162] Contrary to such comments, EEI and UTC recommend that the Commission reform its pole attachment rules to allow greater flexibility for electric utilities to protect and maintain the safety and reliability of critical electric infrastructure, and to facilitate responsible use of such infrastructure by jurisdictional attaching entities.

1. The Commission should enable utilities to deter unauthorized and unsafe attachments through stricter notice and penalty rules.

The Commission should clarify its notice regulations to require notice to utilities before attachments are made so there is opportunity for utilities to ensure that such attachments are made in compliance with applicable safety, reliability, and engineering requirements before approving an application for access. It is important for the Commission to allow utilities to include contractual terms and conditions sufficient to deter unauthorized and unsafe attachments, including specified, substantial penalties in addition to back rent. Additionally, the Commission should clarify its complaint procedures to expressly allow electric utilities to submit complaints for violations of the Commission's notice requirements.

[162] *See, e.g.,* Time Warner Cable Comments at iv, 54; Comcast Comments at vi, Exhibit 3.

2. The Commission should not adopt uniform, national standards for pole access.

The Commission should reject the requests of Fibertech[163] and other commenters urging the Commission to adopt a variety of uniform, nationwide, so-called "best practices" that would hinder the utilities' ability to maintain safety and reliability and exceed the Commission's authority.[164] Such rigid rules would only further undermine utilities' ability to deter unauthorized and unsafe attachments. As explained in EEI and UTC's initial comments, these flawed proposals would result in even less notice, laxer security, and greater hazards to workers (especially communications workers) and system reliability than is already the case in the nearly chaotic current "state of pole attachments."[165]

Moreover, as explained in EEI and UTC's initial comments, the Commission has no authority or expertise in matters of electric safety, reliability, and engineering, and should be reluctant to intrude into such complex technical matters. It would be better for the Commission to defer to the appropriate federal and state agencies and individual utilities in these matters. The Commission's review of terms and conditions should be limited to whether a utility applies the applicable standards to various jurisdictional attaching entities in a nondiscriminatory manner,

---

[163] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Fibertech Networks, LLC and Kentucky Data Link, Inc. at i-ii (filed March 7, 2008).

[164] *See, e.g., Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Cavalier Telephone, LLC at 1-7 (filed March 7, 2008); *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of Current Group LLC at 1-3 (filed March 7, 2008); TWTC Comments at 13-29.

[165] EEI and UTC Comments at 67-74.

and should not address or second-guess the content of such standards. Accordingly, EEI and UTC strongly recommend that the Commission not adopt one-size-fits-all access rules (such as the so called "best practices" advocated by Fibertech), which would inappropriately favor expedient access at the expense of safety, reliability, and engineering soundness.

VI. ILECS HAVE NO POLE ATTACHMENT RIGHTS UNDER SECTION 224.

In its initial comments, the United States Telecom Association ("USTA") states that "section 224(a)(5)'s *purported* exclusion of ILECs from the definition of 'telecommunications carrier' is irrelevant in determining" whether the Commission has authority to regulate ILEC attachments.[166] USTA is wrong. There is nothing "purported" about section 224(a)(5)'s exclusion of ILECs from the definition of "telecommunications carrier." Section 224(a)(5) states: "[f]or purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) *does not include any incumbent local exchange carrier* as defined in section 251(h)."[167] The phrase "does not include" means "excludes." This is not a matter of interpretation. It is a matter of reading. Furthermore, this explicit exclusion is directly relevant to the question of whether the Commission has authority to regulate ILEC attachments. Section 3 defines "telecommunications carrier," in relevant part, as "any provider of telecommunications services."[168] The terms "telecommunications carrier" and "provider of telecommunications services" are, therefore, interchangeable. Accordingly, the Commission's authority to regulate

---

[166] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Comments of the United States Telecommunications Association at p. 16 (filed March 7, 2008) (emphasis added) .

[167] 47 U.S.C. § 224(a)(5).

[168] 47 U.S.C. § 153(44).

attachments by "providers of telecommunications service" does not extend to attachments by ILECs.

VII. CONCLUSION

WHEREFORE, EEI and UTC respectfully request that the Commission consider these Reply Comments and ensure that any future Commission action ordered as a result of this proceeding is consistent with them.

Respectfully submitted,

Edison Electric Institute

/s/ Edward Comer
Edward Comer
Vice President & General Counsel
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-5615

/s/ Aryeh Fishman
Aryeh Fishman
Director, Regulatory Legal Affairs
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-5000

Utilities Telecom Council

/s/Jill M. Lyon
Jill M. Lyon
Vice President & General Counsel
1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
(202) 872-0030

/s/Brett Kilbourne
Brett Kilbourne, Director of Regulatory
Service & Associate Counsel
1901 Pennsylvania Avenue, NW
Fifth Floor
Washington, DC 20006
(202) 872-0030

April 22, 2008